United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7008

~~75-8375~~

B

P/S

United States Court of Appeals

For the Second Circuit

MONROE KORN,

Plaintiff-Appellant,

against

FRED H. MERRILL, REID W. DENNIS, S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY, and RICHARD F. THARP,

JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company,)

FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
APR 2 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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Docket Entries

JUDGE CARTER

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Pltff. Jury demand date: 4/29/74

74 CV. 1662

C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
	For plaintiff:
MONROE KORN	Kaplan, Kilsheimer & Foley 122 E. 42nd St., N.Y. 10017 MU-7-1980
V	
FRED H. MERRILL REID W. DENNIS S. WALDO COLEMAN HERBERT E. DOUGALL WALLACE H. FULTON WILLIAM WALLACE MEIN JR. GEORGE E. OSBORNE PHILIP A. RAY RICHARD F. THARP	
JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of the American Express Company)	For defendant:
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AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY	345 Park Ave., NYC 10022 - 935-8000
AMERICAN EXPRESS COMPANY	[illegible]
AMERICAN EXPRESS INVESTMENT FUND INC.	1 [illegible], NYC 10004 - 943-7000

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
. 5 mailed x	Clerk		4/29/74	Kaplan/K	15 —	
			4/30/74	U.S. Treas		15 —
. 6 mailed ✓	Marshal					
sis of Action: Securities xchange Act of 1934	Docket fee					
	Witness fees					
tion arose at:	Depositions					

74 Civ. 1388

DATE	PROCEEDINGS	Date Order or Judgment Noted
r.29-74	Filed Complaint and issued summons.	
y 20-74	Filed Summons with Marshal's returns served on the following:-	
	Fred H. M rrill by Robert Kaplan on 4/29/74	
	Reid W. Dennis " " " " 4/29/74	
	S. Waldo Coleman" " " " "	
	Herbert Dougall " " " " "	
	Wallace H. Fulton " " " "	
	William Wallace Mein " " " "	
	George Osborne " " " "	
	Philip Ray " " " "	
	Richard Tharp " " " "	
	Fund American Companies " " 5/7/74	
	American Express Investment by Kaplan on~~4/29/74~~ 5/1/74	
	American Express Co. " " " 5/1/74	
	American Express Investment " " " "	
	American Express Investment " " " 5/8/74	
	American Express Investment " " " "	
y-28-74	Filed stip. and order that the time of all defendants to answer is ext. to June 20, 1974 -- Carter, J.	
n-20-74	Filed defendants' affidavits and notice of motion to transfer action to the Northern District of California and ret. 7-5-74	
n-20-74	Filed defendants' memorandum of law in support of motion to transfer.	
n-20-74	Filed stip. and order ext. time for all defendants to answer to pltf's interrog. (first series) is ext. to 7-20-74 -- Carter, J.	
-28-74	Filed stip. and order that the time for deft. Am. Express Investment Fund, Inc. to answer is ext. to 7-10-74 - Carter, J.	
-20-74	Filed ANSWER of defendants American Express Company, American Express Investment Management Company and F.A. Liquidating Corporation	WSP&R JWRW43
-24-74	Filed ANSWER of defendants William Wallace Mein, Jr. and George E. Osborne.	
-28-74	Filed plaintiff's interrog. relating to change of venue.	
- 9-74	Filed stip. and order that the time for deft. Am. Express Investment Fund to answer is ext. to 7-29-74 -- Carter, J.	
- 9-74	Filed stip. and order that the motion to transfer action is adj. to 9-13-74; defts to answer interrog. by 7-29-74; pltf's answering papers re transfer to be filed by 8-26-74; deft's reply papers to be filed by 9-9-74; deft's answer to pltf's interrog. is adj. to 10-11-74 -- Carter, J.	
-29-74	Filed defendants' answers and objections to pltf's interrog. relating to change of venue.	
-8-74	Filed stip. and order that the time for the deft. American Express Investment Fund, Inc. is ext. to 8-9-74 (to answer) with endorsement: This is the 4th and final extension which will be granted. So ordered - Carter, J.	
	Filed WAIVER of defts. American Express Investment Fund, Inc.	JCB
.23-74	Filed pltfs. ~~XXXXXX~~ memorandum of law in opposition to defts. motion for transfer of the action.	
. 23-74	Filed pltfs. affdt. of Robert Kaplan.	
	Filed Reply Memorandum in support of motion of all defts. served with process to transfer action to the USDC for the Northern Dist. of CALIFORNIA.	
	Filed Stipulation ... (for further extension ... granted ... endorsement)	

- cont'd p. 3 -

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Of Judgment
Nov-11-75	Filed answers and objections of defts. American Express Co., etal. to plaintiff's interrog. - first series.	
03-05-75	Filed pltf's interrog.	
04-07-75	Filed OPINION #42205...defendants motion to transfer pursuant to 28:1404(a) is denied. So ordered. -- Carter, J. m/n	
04-29-75	Filed by defendants American Express Co., Am. Express Investment Management Co. and FA Liquidating Corp.'s - sta tement under Rule 9(g), affdvt., exhibits and notice of motion for judgment on the pleadings or summary judgment -- ret. 5-9-75	
04-29-75	Filed defts. American Express Co., et.al.'s memorandum in support of above motion	
05-14-75	Filed stip. and order that defts motion for judgment or summary judgment is adj. to 6-6-75 and that pltf's answering papers shall be served by 5-30-75 -- Carter, J.	
06-05-75	Filed deft's reply memorandum in support of motion of defendants for judgment on the pleadings or for summary judgment.	
06-06-75	Filed plaintiff's opposing statement under Rule 9(g)	
06-06-75	Filed plaintiff's memorandum in opposition to defts' motion for judgment on the pleadings	
07-01-75	Filed ANSWER of defts Fred H. Merrill, Reid W. Dennis and Herbert E. Dougall	PWW&G
07-11-75	Filed additional summons and Marshals returns - served: Richard F. Tharp -- unable to serve Reid W. Dennis by Mrs. R. W. Dennis on 6-11-75 Fred H. Merrill by E. Merrill on 6-10-75 Herbert E. Dougall on 6-12-75	
11-05-75	Filed OPINION #43335...Defendants motion for summary judgment is granted but not in its entirety for reasons stated herein. So ordered. -- Carter, J. m.n.	
11-10-75	Filed JUDGMENT and order granting defendants motion for summary judgment. Ordered that defendants have judgment against the plaintuff, dismissing the complaint. -- CLERK.	
11-07-75	Filed pltfs interrog - 2nd set.	
11-28-75	Filed pltff's Notice of appeal to the U.S.C.A. from the opinion & order dated 10-31-75 and filed in this Court 11-05-75. M/n to Winthrop Stimson Putman & Roberts; Paul Weiss Rifkind Wharton & Garrison; Simpson Thacher & Bartlett-11-28-75.	
12-31-75	Fld Notice that the record was transmitted to USCA on 12-31-75.	
2-26-76	Fld Order that for SDof NY is dismissed... Fusarom Clerk USCA.mn	

Plaintiff's Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

4a

----------x

MONROE KORN,

Plaintiff,

-against-

FRED H. MERRILL, REID W. DENNIS, S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY and RICHARD F. THARP,

JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company,)

FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC.,

Defendants.

----------x

COMPLAINT

PLAINTIFF DEMANDS TRIAL BY JURY

74 Civ.

Plaintiff, complaining of defendants, alleges on information and belief, except that ¶ 2 is alleged on knowledge by the plaintiff herein:

1. (a) The Court's jurisdiction is based on the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. (the "Act"), the rules and regulations issued thereunder, the Securities Exchange Act of 1934, 15 U.S.C. § 78a-1 et seq., the rules and regulations issued thereunder, the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1, and the rules and regulations issued thereunder.

(b) Claims alleged herein are based on the Act, the Securities Exchange Act of 1934, the Investment Advisers Act of

1940, and the rules and regulations issued thereunder.

(c) The acts and transactions complained of occurred in substantial part in the Southern District of New York.

2. (a) Plaintiff Monroe Korn is a shareholder of defendant American Express Investment Fund, Inc. ("Fund") and has been such since at least January 1968, and at the time of the transactions complained of herein a shareholder of Fund or of its predecessor corporation Commonwealth Investment Company. As used herein "Fund" refers to American Express Investment Fund, Inc. and to its predecessor Commonwealth Investment Company. On April 27, 1970, the name of Commonwealth Investment Company was changed to American Express Investment Fund, Inc.

(b) Plaintiff brings this action derivatively on behalf of Fund and its stockholders.

(c) The action is not brought collusively to confer upon this Court jurisdiction which it would otherwise not have.

3. (a) Fund, a Delaware corporation, was at all times herein mentioned and now is a mutual fund registered under the Act as an open-end management investment company.

4. (a) In and about September,1968, the net assets of Fund were approximately $192,000,000.

(b) In and about September, 1968, Fund had, and it now has, approximately 27,000 stockholders widely scattered throughout the United States and foreign countries.

5. (a) Defendant Fund American Investment Management Company "FAIMCO" which was in 1968 a wholly-owned subsidiary of The Fund

American Companies ("FAC"), acted as the investment adviser of Fund. FAIMCO'a name has been changed to American Express Investment Management Company ("AEIMCO"). As used herein "FAIMCO" also refers to AEIMCO for the period subsequent to its change of name.

(b) Pursuant to the investment advisory agreement between Fund and FAIMCO, Fund paid FAIMCO an annual advisory fee at the rate of 1/2 of 1% of the average daily net assets of Fund. On net assets of Fund in excess of $150,000,000 the advisory fee was paid at the rate of 4/10 of 1%.

(c) Under the advisory agreement, FAIMCO continuously rendered investment advice to Fund, determined what securities were to be purchased or sold, and executed the purchase and sale orders.

(d) Under the terms of the advisory agreement, FAIMCO provided Fund with certain management services, executives and other personnel, office space and equipment and paid for other related office expenses.

6. In 1968 and for some years prior thereto, FAIMCO, also acted as the principal underwriter for the shares of Fund pursuant to an underwriting agreement, under which FAIMCO sold the shares of stock of Fund to the public on a continuous basis.

7. (a) As of September,1968, the directors of Fund included defendants Merrill, Dennis, S. Waldo Coleman, Tharp, Dougall, Fulton, Mein, Osborne, and Ray.

(b) As of September, 1968, the officers of Fund included defendant Dennis (president). and defendant Tharp (vice president).

8. (a) As of September, 1968, the directors of FAIMCO included defendants Merrill, Dennis, and Tharp.

(b) As of 1968, the officers of FAIMCO included defendant Dennis (president), and defendant Tharp (vice president).

9. (a) As of September, 1968, the directors of FAC included defendant Merrill, and the officers of FAC included defendants Merrill (president) and Tharp (senior vice president).

10. The names of the stockholders of FAC as of September, 1968, are unknown to plaintiffs. They are joined under the fictitious names of John Doe 1 to John Doe 1,000.

11. (a) American Express Company ("American Express") is, and was, a New York corporation.

(b) In June, 1968, FAC and American Express entered into an agreement (the"Agreement") whereby American Express was to acquire control of FAIMCO by means of an acquisition of substantially all the assets of FAC including all the outstanding shares of FAIMCO. Under the Agreement, all the assets of FAC would be transferred to a newly formed, wholly-owned subsidiary of American Express. In exchange therefor American Express was to issue shares of its preferred stock to the shareholders of FAC. The aggregate market value of the American Express shares issued in consideration of the transaction was approximately $415,000,000.

(c) Upon the consummation of the Agreement, FAIMCO was to become a wholly-owned subsidiary of American Express.

12. (a) By virtue of §§ 15(a), 15(b), 2(a)(4) and 2(a)(9) of the Act, the consummation of the Agreement was bound to result in

the termination of the advisory and underwriting agreements between Fund and FAIMCO. The advisory and underwritings agreements were a principal source of income to FAIMCO. Under these contracts, FAIMCO was thus able to provide FAC with a substantial source of income. Without these agreements, the FAC assets could not have been exchanged for stock of American Express valued at at least $415,000,000. Accordingly, the Agreement provided that American Express' obligation to acquire the FAC assets pursuant to the Agreement was subject to the conditions precedent (i) that the stockholders of Fund would approve the reinstatement of the advisory agreement, and (ii) that the board of directors of Fund would approve the reinstatement of the underwriting agreement.

(b) In connection with the Agreement, it was understood among the parties thereto and FAIMCO, that FAIMCO, it officers, directors and sole stockholder, FAC and FAC's officers, directors and principal stockholders would use their best efforts to secure the reinstatement of the advisory agreement by the stockholders of Fund and the reinstatement of the underwriting agreement by the board of directors of Fund.

13. (a) Under the date of August 16, 1968, the management of Fund, pursuant to recommendations of FAIMCO, its officers, directors and sole stockholder, FAC, issued a Notice of Annual Meeting of Stockholders to be held on September 24, 1968, accompanied by a Proxy Statement.

(b) The Notice of Annual Meeting and Proxy Statement recited that the meeting was called for the purpos among other, of approving the reinstatement of the advisory agreeme t between Fund and

FAIMCO upon the consummation of the Agreement.

(c) The Proxy Statement recited, among other things: The proxies were solicited on behalf of the management of Fund. The management of Fund recommended approval of the reinstatement of the advisory agreement.

(d) Substantial parts of the information set forth in the Proxy Statement and relevant to the proposed approval of the reinstatement of the advisory agreement had been supplied by FAIMCO, FAC, American Express, and their respective directors, officers and principal stockholders.

(e) The Notice of Annual Meeting and Proxy Statement were mailed to the stockholders of Fund. A large number of the stockholders resided in the Southern District of New York and received the Proxy Statement in said district.

14. (a) At the annual meeting of September 24, 1968, the stockholders of Fund, in reliance on the Proxy Statement, its recommendations and representations, approved the reinstatement of the advisory agreement upon the consummation of the Agreement.

(b) The board of directors of Fund approved the reinstatement of the underwriting agreement between Fund and FAIMCO to be effective upon the consummation of the Agreement.

15. The Agreement was consummated in or about October 31, 1968.

16. (a) The transactions herein alleged constituted a sale to American Express of FAIMCO's fiduciary position as investment adviser, and its position as principal underwriter of Fund, in

violation of the Act.

(b) Of the more than $415,000,000 of American Express securities received by FAC shareholders for its assets only a percentage of the American Express securities represented payment for the assets of FAC. The excess amount received by FAC constituted payment for the fiduciary offices and for defendants' inducing Fund stockholders to approve the reinstatement of the advisory agreement between Fund and FAIMCO.

(c) Since American Express was willing to pay a multi-million dollar consideration for the privilege of controlling or becoming the adviser and principal underwriter of Fund, FAIMCO, its sole stockholder FAC, their directors, officers and principal stockholders breached their fiduciary duties to Fund by causing that sum to be paid to FAC and its stockholders instead of channeling it to Fund, either directly or through a reduction of the advisory fees payable by Fund.

(d) Defendants' conduct deprived Fund and its stockholders of their statutory rights to pass on the reinstatement of Fund's advisory agreement under the guidance, uninfluenced by motives of personal gain, of FAIMCO, its sole stockholder FAC, and their officers, directors and principal stockholders and the management of Fund.

(e) The defendants other than Fund participated, pursuant to a common plan and understanding among them, in bringing about the sale of the fiduciary offices. They are jointly and severally liable for their resulting profits and for the damages of Fund.

(f) Shareholders of FAC who received shares of American Express upon the consummation of the Agreement are jointly and severally

ng profits and for the damages of Fund.

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he approval by the directors of Fund of
underwriting agreement, was void and of

instated advisory and underwriting agreements
ns and renewals thereof were and are void and

and American Express are jointly and
for the profits they derived from FAIMCO's
ent adviser.
and American Express are jointly and
for the profits they derived from FAIMCO's
al underwriter.

oxy Statement of August 16, 1968 was materially
complete, in violation of §§ 20 and 34 of
d regulations issued thereunder, §§ 10 and 14
ge Act of 1934, and the rules and regulations
06 of the Investment Advisers Act of 1940,
tions issued thereunder, at least in the fol-

oxy Statement failed to reveal that Fund and
titled to the profits arising from defendants'
offices.
oxy Statement failed to reveal that the officers,

directors and principal stockholders of Fund, FAIMCO, and FAC had agreed to employ the proxy machinery of Fund in order to foster and procure the approval of the advisory contract by Fund's stockholders.

(c) The Proxy Statement failed to reveal that the securities received by FAC stockholders, to the extent that value exceeded the tangible net asset value (book value) of their shares in FAC, constituted consideration for the sale of a fiduciary office, and was in fact and in law an asset of Fund and not an asset of FAIMCO, FAC or their stockholders.

(d) The Proxy Statement failed to reveal that FAIMCO, FAC and their officers, directors and shareholders had agreed to employ their best efforts to induce and effect the reinstatement of the advisory and underwriting contracts with Fund thus transferring Fund's advisory and underwriting business to American Express, and to influence Fund's stockholders to grant approval thereof.

(e) The Proxy Statement failed to reveal that new advisory and underwriting contracts had value for which a party to whom such contracts were awarded would be willing to pay substantial consideration, and that parties other than American Express might be willing to pay to Fund a substantial consideration for the award of such contracts or to render the services thereunder for reduced compensation.

(f) The Proxy Statement failed to reveal that the value of new investment advisory and underwriting contracts was an asset which Fund could have realized for itself.

(g) The Proxy Statement failed to reveal that consummation

of the Agreement would produce a multimillion dollar profit to stockholders of FAC.

(h) The Proxy Statement failed to reveal which of the directors and officers of Fund were shareholders of FAC, the number and value of FAC shares owned by them and the number and value of American Express shares which they would receive upon the consummation of the Agreement.

19. FAIMCO, FAC, American Express, their officers, directors and stockholders and officers and directors of Fund, participated in, and supplied information for, the preparation of the Proxy Statement.

20. By reason of the material falsity and incompleteness of the Proxy Statement, defendants are jointly and severally liable to Fund, as alleged in ¶¶ 16 and 17 .

21. Demand upon the board of directors to bring this action would be futile because:

(a) At the present time the board of directors of Fund consists of eleven members. Six of them, consisting of a majority, were directors of Fund at the time of the transactions complained of, participated therein with knowledge or notice of their illegality, and are liable therefor.

(b) Another present director, Lewis V. Coleman was a senior vice-president of Fund, was a director and officer of FAIMCO at the time of the transactions complained of and is related to defendant S. Waldo Coleman.

(c) Another present director of Fund, Harry A. Olson, Jr.

was a director of FAIMCO and vice president of FAC at the time of the complained of transactions.

(d) Defendant Fred H. Merrill,who in September 1968 was chairman of the board of directors of Fund,is currently an "advisor" to the Fund's board of directors and is still a director of AEIMCO.

(e) The directors of Fund are thus not free of interests adverse to bringing this action. The institution of this action by the directors of Fund would place it in hostile hands and would prevent its effective prosecution.

22. Demand upon the shareholders of Fund to bring this action would be futile and is unnecessary because:

(a) The wrongs alleged herein violated the law and are incapable of stockholder ratification.

(b) Under Delaware law, the management of Fund and its affairs, including the bringing of lawsuits, is entrusted to its directors and not to the shareholders. The shareholders cannot by resolution or otherwise require Fund and its directors to bring an action.

(c) Fund has more than 27,000 shareholders scattered all over the United States and foreign countries. Their identity is subject to frequent changes. To secure action from the shareholders would require a proxy fight with management, which controls the proxy machinery of Fund and uses Fund's moneys in preparing and mailing proxy material and soliciting the shareholders' votes. The conduct of a proxy fight by plaintiffs would entail prohibitive expenses and would cause undue loss of time, so that the claims alleged might become barred by the statute of limitations or laches.

WHEREFORE, judgment is prayed for:

a) Requiring the defendants other than Fund, jointly and severally, to pay to Fund and its shareholders the defendants' profits and Fund's losses;

b) Rescinding the investment advisory agreement between Fund and FAIMCO and requiring FAIMCO and American Express to return all consideration received by them by virtue of said agreement;

c) Rescinding the underwriting agreement between FAIMCO and Fund and requiring FAIMCO and American Express to return all consideration received by them by virtue of said agreement;

d) Impressing a constructive trust for the benefit of Fund and its stockholders as to all American Express securities received by the defendant stockholders of FAC by reason of the wrongs complained of herein together with all accretions thereto and the proceeds of the dispositions, if any thereof;

e) Allowing plaintiffs the costs and expenses of this action, including reasonable counsel fees; and

f) Granting such other and further relief as may be just.

KAPLAN, KILSHEIMER & FOLEY

By Robert N. Kaplan

A Member of the Firm
Attorneys for Plaintiff Monroe Korn
122 East 42nd Street
New York, New York 10017
(212) MU 7-1980

STATE OF NEW YORK)
: SS.:
COUNTY OF)

MONROE KORN, being duly sworn deposes and says that he is the plaintiff in the within action; that he has read the Complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

Monroe Korn
MONROE KORN

Sworn To Before Me This
11 day of APRIL, 1974.

Daniel King

DANIEL KING
Notary Public, State of New York
No. 31-2110713
Qualified in New York County
Commission Expires March 30, 1975

Answer of Defendants William

Wallace Mein, Jr. and George E. Osborne

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MONROE KORN, Plaintiff, -against- FRED H. MERRILL, REID W. DENNIS, S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY and RICHARD F. THARP, JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company), FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC., Defendants.	74 Civil 1862 (RLC) ANSWER

Defendants William Wallace Mein, Jr. and George E. Osborne (hereinafter collectively referred to as "these defendants"), by their attorneys, Paul, Weiss, Rifkind, Wharton & Garrison, for their answer to the complaint herein allege as follows:

1(a). Answering the allegations of subparagraph 1(a) of the complaint, these defendants admit that plaintiff purports to base the jurisdiction of this Court on the Investment Company Act of 1940, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and the rules and regulations issued under said statutes. Except as herein expressly admitted,

these defendants deny each and every allegation of subparagraph 1(a) of the complaint.

(b) Answering the allegations of subparagraph 1(b) of the complaint, these defendants admit that plaintiff purports to base claims on the Investment Company Act of 1940, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and the rules and regulations issued under said statutes. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 1(b) of the complaint.

(c) These defendants deny each and every allegation of subparagraph 1(c) of the complaint.

2(a). Answering the allegations of subparagraph 2(a) of the complaint, these defendants admit the allegations contained in the last two sentences of said subparagraph. Except as herein expressly admitted, these defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph 2(a) of the complaint.

(b) Answering the allegations of subparagraph 2(b) of the complaint, these defendants admit that plaintiff purports to bring this action derivatively on behalf of American Express Investment Fund, Inc., formerly known as Commonwealth Investment Company (the "Fund") and its stockholders. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 2(b) of the complaint.

(c). These defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph 2(c) of the complaint.

3(a). These defendants admit the allegations of subparagraph 3(a) of the complaint.

4. These defendants admit the allegations of paragraph 4 of the complaint and the subparagraphs thereof.

5(a). These defendants admit the allegations of subparagraph 5(a) of the complaint.

(b). Answering the allegations of subparagraph 5(b) of the complaint, these defendants refer to the investment advisory agreement between the Fund and Fund American Investment Management Company ("FAIMCO") for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 5(b) of the complaint.

(c). Answering the allegations of subparagraph 5(c) of the complaint, these defendants refer to the investment advisory agreement between the Fund and FAIMCO for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 5(c) of the complaint.

(d). Answering the allegations of subparagraph 5(d) of the complaint, these defendants refer to the investment

advisory agreement between the Fund and FAIMCO for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 5(d) of the complaint.

6-9. These defendants admit the allegations of paragraphs 6 through 9, inclusive, of the complaint and the subparagraphs thereof.

10. These defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 10 of the complaint.

11(a). These defendants admit the allegations of subparagraph 11(a) of the complaint.

(b) Answering the allegations of subparagraph 11(b) of the complaint, these defendants admit that F. A. Liquidating Corporation (sued herein under the name Fund American Companies ("FAC")) and American Express Company ("Amexco") entered into an agreement and plan of reorganization dated as of July 22, 1968 (the "Agreement"). These defendants refer to the Agreement for a statement of its provisions. Except as herein expressly admitted or otherwise treated, these defendants deny each and every allegation of subparagraph 11(b) of the complaint.

(c) Answering the allegations of subparagraph 11(c) of the complaint, these defendants refer to the Agreement for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 11(c) of the complaint.

12(a). Answering the allegations of subparagraph 12(a) of the complaint, these defendants refer to §§ 15(a), 15(b), 2(a)(4) and 2(a)(9) of the Investment Company Act of 1940 for a statement of their provisions. These defendants admit that the investment advisory agreement and underwriting agreement were a principal source of income of FAIMCO. These defendants refer to the Agreement for a statement of its provisions. Except as herein expressly admitted or otherwise treated, these defendants deny each and every allegation of subparagraph 12(a) of the complaint.

(b). These defendants deny each and every allegation of subparagraph 12(b) of the complaint.

13(a). Answering the allegations of subparagraph 13(a) of the complaint, these defendants admit that the Fund issued, under date of August 16, 1968, a Notice of Special Meeting of Stockholders to be held on September 24, 1968, accompanied by a Proxy Statement. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 13(a) of the complaint.

(b). Answering the allegations of subparagraph 13(b) of the complaint, these defendants refer to the Notice of Special Meeting and Proxy Statement for a statement of their contents. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 13(b) of the complaint.

(c). Answering the allegations of subparagraph 13(c) of the complaint, these defendants refer to the Proxy

Statement for a statement of its contents. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 13(c) of the complaint.

(d). Answering the allegations of subparagraph 13(d) of the complaint, these defendants admit that certain information in the Proxy Statement was supplied to the Fund by some of the sources alleged. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 13(d) of the complaint.

(e). Answering the allegations of subparagraph 13(e) of the complaint, these defendants admit that the Notice of Special Meeting and Proxy Statement were mailed to the stockholders of the Fund. These defendants further admit that stockholders of the Fund resided in the Southern District of New York and received the Proxy Statement in said District. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 13(e) of the complaint.

14(a). Answering the allegations of subparagraph 14(a) of the complaint, these defendants admit that at the Special Meeting of September 24, 1968 the stockholders of the Fund approved a new investment advisory agreement with FAIMCO. These defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that the stockholders of the Fund acted in reliance on the Proxy Statement. Except as herein expressly admitted or otherwise treated, these defendants deny each and every allegation of subparagraph 14(a) of the complaint.

(b). Answering the allegations of subparagraph 14(b) of the complaint, these defendants admit that the Board of Directors of the Fund approved a new underwriting agreement with FAIMCO. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 14(b) of the complaint.

15. These defendants admit the allegations of paragraph 15 of the complaint.

16-17. These defendants deny each and every allegation of paragraphs 16 and 17 of the complaint and the subparagraphs thereof.

18. Answering the allegations of paragraph 18 of the complaint and the subparagraphs thereof, these defendants refer to the Proxy Statement of August 16, 1968 for a statement of its contents. Except as herein otherwise treated, these defendants deny each and every allegation of paragraph 18 of the complaint and the subparagraphs thereof.

19. Answering the allegations of paragraph 19 of the complaint, these defendants admit that certain information in the Proxy Statement was supplied to the Fund by some of the sources alleged. Except as herein expressly admitted, these defendants deny each and every allegation of paragraph 19 of the complaint.

20. These defendants deny each and every allegation of paragraph 20 of the complaint.

21. Answering the allegations of paragraph 21 of the complaint and the subparagraphs thereof, these defendants admit that Lewis V. Coleman, a director of the Fund, was a Senior Vice President of the Fund and a director and officer of FAIMCO at the time of the transactions complained of and is related to the defendant S. Waldo Coleman. These defendants further admit that Harry A. Olson, Jr., a director of the Fund, was a director of FAIMCO and a Vice President of FAC at the time of the transactions complained of. These defendants further admit that defendant Fred H. Merrill was Chairman of the Fund in September 1968 and is currently an adviser to the Fund's Board of Directors and a director of American Express Investment Management Company ("AEIMCO"). Except as herein expressly admitted, these defendants deny each and every allegation of paragraph 21 of the complaint and the subparagraphs thereof.

22. Answering the allegations of paragraph 22 of the complaint and the subparagraphs thereof, these defendants admit that the Fund has more than 24,000 shareholders scattered all over the United States and foreign countries, and that their identity is subject to frequent changes. These defendants deny that any acts alleged in the complaint constitute violations of law. These defendants refer to the Delaware corporate law for a statement of its provisions. Except as herein expressly admitted or otherwise treated, these defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 22 of the complaint and the subparagraphs thereof.

FIRST DEFENSE

23. The rights of action purportedly set forth in the complaint did not accrue within four years next before the commencement of this action, and are barred by the applicable statutes of limitations.

SECOND DEFENSE

24. Plaintiff does not fairly and adequately represent the interests of the shareholders of the Fund in enforcing the alleged rights of the Fund.

THIRD DEFENSE

25. Plaintiff has not furnished adequate excuse for his failure to make an effort to obtain the action he desires from the directors and shareholders of the Fund.

FOURTH DEFENSE

26. Service of process upon these defendants was made by virtue of deputized service of process outside of the State of New York.

27. The United States District Court for the Southern District of New York is an improper venue for the institution of this action. Accordingly, deputized service of process outside of the State of New York was improper and insufficient and the Court has thus not acquired jurisdiction over the person of these defendants.

WHEREFORE, these defendants demand judgment dismissing the complaint herein, and awarding them the costs and disbursements of the action.

Dated: June 19, 1974

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____
A Member of the Firm

Attorneys for Defendants
William Wallace Mein, Jr. and
George E. Osborne
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345 Park Avenue
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(212) 935-8000

Answer of Defendants American Express Company, American Express Investment Management Company and F.A. Liquidating Corporation

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MONROE KORN, Plaintiff, -against- FRED H. MERRILL, REID W. DENNIS, S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY and RICHARD F. THARP, JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company), FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC., Defendants.	74 Civil 1862 (RLC) ANSWER

Defendants American Express Company ("Amexco"), American Express Investment Management Company ("AEIMCO") and F. A. Liquidating Corporation (sued herein under the name Fund American Companies ("FAC")) (hereinafter collectively referred to as "these defendants"), by their attorneys, Winthrop, Stimson, Putnam & Roberts, for their answer to the complaint herein allege as follows:

1(a). Answering the allegations of subparagraph 1(a) of the complaint, these defendants admit that plaintiff purports to base the jurisdiction of this Court on the Investment Company Act of 1940, the Securities Exchange Act of 1934, the Investment Advisers Act of 1934, and the rules and regulations issued under

said statutes. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 1(a) of the complaint.

(b). Answering the allegations of subparagraph 1(b) of the complaint, these defendants admit that plaintiff purports to base claims on the Investment Company Act of 1940, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and the rules and regulations issued under said statutes. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 1(b) of the complaint.

(c). These defendants deny each and every allegation of subparagraph 1(c) of the complaint.

2(a). Answering the allegations of subparagraph 2(a) of the complaint, these defendants admit the allegations contained in the last two sentences of said subparagraph. Except as herein expressly admitted, these defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph 2(a) of the complaint.

(b). Answering the allegations of subparagraph 2(b) of the complaint, these defendants admit that plaintiff purports to bring this action derivatively on behalf of American Express Investment Fund, Inc., formerly known as Commonwealth Investment Company (the "Fund") and its stockholders. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 2(b) of the complaint.

(c). These defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph 2(c) of the complaint.

3(a). These defendants admit the allegations of subparagraph 3(a) of the complaint.

4. These defendants admit the allegations of paragraph 4 of the complaint and the subparagraphs thereof.

5(a). These defendants admit the allegations of subparagraph 5(a) of the complaint.

(b). Answering the allegations of subparagraph 5(b) of the complaint, these defendants refer to the investment advisory agreement between the Fund and Fund American Investment Management Company ("FAIMCO") for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 5(b) of the complaint.

(c). Answering the allegations of subparagraph 5(c) of the complaint, these defendants refer to the investment advisory agreement between the Fund and FAIMCO for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 5(c) of the complaint.

(d). Answering the allegations of subparagraph 5(d) of the complaint, these defendants refer to the investment advisory agreement between the Fund and FAIMCO for a statement of its pro-

visions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 5(d) of the complaint.

6-9. These defendants admit the allegations of paragraphs 6 through 9, inclusive, of the complaint and the subparagraphs thereof.

10. These defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 10 of the complaint.

11(a). These defendants admit the allegations of subparagraph 11(a) of the complaint.

(b) Answering the allegations of subparagraph 11(b) of the complaint, these defendants admit that FAC and Amexco entered into an agreement and plan of reorganization dated as of July 22, 1968 (the "Agreement"). These defendants refer to the Agreement for a statement of its provisions. Except as herein expressly admitted or otherwise treated, these defendants deny each and every allegation of subparagraph 11(b) of the complaint.

(c). Answering the allegations of subparagraph 11(c) of the complaint, these defendants refer to the Agreement for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 11(c) of the complaint.

12(a). Answering the allegations of subparagraph 12(a) of the complaint, these defendants refer to §§ 15(a), 15(b), 2(a)(4

and 2(a)(9) of the Investment Company Act of 1940 for a statement of their provisions. These defendants admit that the investment advisory agreement and underwriting agreement were a principal source of income of FAIMCO. These defendants refer to the Agreement for a statement of its provisions. Except as herein expressly admitted or otherwise treated, these defendants deny each and every allegation of subparagraph 12(a) of the complaint.

(b). These defendants deny each and every allegation of subparagraph 12(b) of the complaint.

13(a). Answering the allegations of subparagraph 13(a) of the complaint, these defendants admit that the Fund issued, under date of August 16, 1968, a Notice of Special Meeting of Stockholders to be held on September 24, 1968, accompanied by a Proxy Statement. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 13(a) of the complaint.

(b). Answering the allegations of subparagraph 13(b) of the complaint, these defendants refer to the Notice of Special Meeting and Proxy Statement for a statement of their contents. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 13(b) of the complaint.

(c). Answering the allegations of subparagraph 13(c) of the complaint, these defendants refer to the Proxy Statement for a statement of its contents. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 13(c) of the complaint.

(d). Answering the allegations of subparagraph 13(d) of the complaint, these defendants admit that certain information in the Proxy Statement was supplied to the Fund by some of the sources alleged. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 13(d) of the complaint.

(e). Answering the allegations of subparagraph 13(e) of the complaint, these defendants admit that the Notice of Special Meeting and Proxy Statement were mailed to the stockholders of the Fund. These defendants further admit that stockholders of the Fund resided in the Southern District of New York and received the Proxy Statement in said District. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 13(e) of the complaint.

14(a). Answering the allegations of subparagraph 14(a) of the complaint, these defendants admit that at the Special Meeting of September 24, 1968 the stockholders of the Fund approved a new investment advisory agreement with FAIMCO. These defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that the stockholders of the Fund acted in reliance on the Proxy Statement. Except as herein expressly admitted or otherwise treated, these defendants deny each and every allegation of subparagraph 14(a) of the complaint.

(b). Answering the allegations of subparagraph 14(b) of the complaint, these defendants admit that the Board of Directors of the Fund approved a new underwriting agreement with FAIMCO. Except as herein expressly admitted, these defendants

deny each and every allegation of subparagraph 14(b) of the complaint.

15. These defendants admit the allegations of paragraph 15 of the complaint.

16-17. These defendants deny each and every allegation of paragraphs 16 and 17 of the complaint and the subparagraphs thereof.

18. Answering the allegations of paragraph 18 of the complaint and the subparagraphs thereof, these defendants refer to the Proxy Statement of August 16, 1968 for a statement of its contents. Except as herein otherwise treated, these defendants deny each and every allegation of paragraph 18 of the complaint and the subparagraphs thereof.

19. Answering the allegations of paragraph 19 of the complaint, these defendants admit that certain information in the Proxy Statement was supplied to the Fund by some of the sources alleged. Except as herein expressly admitted, these defendants deny each and every allegation of paragraph 19 of the complaint.

20. These defendants deny each and every allegation of paragraph 20 of the complaint.

21. Answering the allegations of paragraph 21 of the complaint and the subparagraphs thereof, these defendants admit that Lewis V. Coleman, a director of the Fund, was a Senior Vice President of the Fund and a director and officer of FAIMCO at the time of the transactions complained of and is related to the

defendant S. Waldo Coleman. These defendants further admit that Harry A. Olson, Jr., a director of the Fund, was a director of FAIMCO and a Vice President of FAC at the time of the transactions complained of. These defendants further admit that defendant Fred H. Merrill was Chairman of the Fund in September 1968 and is currently an adviser to the Fund's Board of Directors and a director of AEIMCO. Except as herein expressly admitted, these defendants deny each and every allegation of paragraph 21 of the complaint and the subparagraphs thereof.

22. Answering the allegations of paragraph 22 of the complaint and the subparagraphs thereof, these defendants admit that the Fund has more than 24,000 shareholders scattered all over the United States and foreign countries, and that their identity is subject to frequent changes. These defendants deny that any acts alleged in the complaint constitute violations of law. These defendants refer to the Delaware corporate law for a statement of its provisions. Except as herein expressly admitted or otherwise treated, these defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 22 of the complaint and the subparagraphs thereof.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, THESE DEFENDANTS ALLEGE:

23. The rights of action purportedly set forth in the complaint did not accrue within four years next before the commencement of this action, and are barred by the applicable statutes of limitations.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, THESE DEFENDANTS ALLEGE:

24. Plaintiff does not fairly and adequately represent the interests of the shareholders of the Fund in enforcing the alleged rights of the Fund.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, THESE DEFENDANTS ALLEGE:

25. Plaintiff has not furnished adequate excuse for his failure to make an effort to obtain the action he desires from the directors of the Fund.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE OF DEFENDANT F. A. LIQUIDATING CORPORATION (FORMERLY FAC):

26. Plaintiff has failed to make a claim against defendant F. A. Liquidating Corporation (formerly FAC) in the manner provided by law in the liquidation proceedings for said corporation in the Superior Court of the State of California, City and County of San Francisco, and accordingly is barred from asserting such a claim herein.

WHEREFORE, these defendants demand judgment dismissing the complaint herein, and awarding them the costs and disbursements of the action.

Dated: June 20, 1974

WINTHROP, STIMSON, PUTNAM & ROBERTS

By Stephen G. Weiner
A Member of the Firm

Attorneys for Defendants
American Express Company,
American Express Investment
Management Company, and
F. A. Liquidating Corporation
(formerly The Fund American
Companies)
Office & P. O. Address
40 Wall Street
New York, N. Y. 10005
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Answer of Defendant American

Express Investment Fund, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MONROE KORN, Plaintiff, -against- FRED H. MERRILL, REID W. DENNIS. S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY and RICHARD F. THARP, JOHN DOE 1 TO JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of American Express Company), FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC., Defendants.	ANSWER ON BEHALF OF AMERICAN EXPRESS INVESTMENT FUND, INC. 74 Civ. 1862 (RLC)

Defendant American Express Investment Fund, Inc. (the "Fund"), by its attorneys, Simpson Thacher & Bartlett, for its answer to the complaint herein:

1. Denies each and every allegation in paragraph 1(a) of the complaint except admits that plaintiff purports to base jurisdiction on the statutes, rules and regulations designated.

2. Denies each and every allegation in paragraph 1(b) of the complaint except admits that plaintiff purports to base claims on the statutes and rules designated.

3. Denies each and every allegation in paragraph 1(c) of the complaint.

4. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation in paragraph 2(a) of the complaint, except admits the allegations in the last two sentences of said paragraph.

5. Denies each and every allegation in paragraph 2(b) of the complaint, except admits that plaintiff purports to bring this action derivatively on behalf of the Fund and its stockholders.

6. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation in paragraph 2(c) of the complaint.

7. Admits the allegations in paragraphs 3(a), 4, and 5(a) of the complaint.

8. Denies each and every allegation in paragraphs 5(b), 5(c) and 5(d) of the complaint except respectfully refers to the investment advisory agreement between the Fund and Fund American Investment Management Company ("FAIMCO") for a statement of its provisions.

9. Admits the allegations in paragraphs 6, 7, 8 and 9 of the complaint.

10. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation in paragraph 10 of the complaint.

11. Admits the allegations in paragraph 11(a) of the complaint.

12. Denies each and every allegation in paragraph 11(b) and 11(c) of the complaint, except admits that Fund American Companies ("FAC") and American Express Company ("Amexco") entered into an agreement and plan of reorganization dated as of July 22, 1968 (the "Agreement") and respectfully refers to the Agreement for a statement of its provisions.

13. Denies each and every allegation in paragraph 12 of the complaint, except respectfully refers to the statutes designated and the Agreement for a statement of their provisions and admits that the investment advisory agreement and underwriting agreement were a principal source of income of FAIMCO.

14. Denies each and every allegation in paragraph 13 of the complaint, except admits that it issued, under date of August 16, 1968, a Notice of Special Meeting of Stockholders to be held on September 24, 1968, accompanied by a Proxy Statement, respectfully refers to such documents for a statement of their contents, admits that certain information in the Proxy Statement was supplied to the Fund by some of the sources designated and admits that the Notice of Special Meeting and Proxy Statement were mailed to the stockholders of the Fund, some of whom resided in the Southern District of New York and received the Proxy Statement in said District.

15. Denies each and every allegation in paragraph 14 of the complaint, except admits that at the special meeting of September 24, 1968 the stockholders of the Fund approved a new investment advisory agreement with FAIMCO and

that the Board of Directors of the Fund approved a new underwriting agreement with FAIMCO and denies knowledge or information sufficient to form a belief as to the truth of the allegation that the stockholders of the Fund acted in reliance on the Proxy Statement.

16. Admits the allegations in paragraph 15 of the complaint.

17. Denies each and every allegation in paragraphs 16 and 17 of the complaint.

18. Denies each and every allegation in paragraph 18 of the complaint and respectfully refers to the Proxy Statement of August 16, 1968 for a statement of its contents.

19. Denies each and every allegation in paragraph 19 of the complaint except admits that certain information in the Proxy Statement was supplied to the Fund by some of the sources designated.

20. Denies each and every allegation in paragraph 20 of the complaint.

21. Denies each and every allegation in paragraph 21 of the complaint except admits that Lewis V. Coleman, a director of the Fund, was a Senior Vice President of the Fund and a director and officer of FAIMCO at the time of the transactions complained of and is related to the defendant S. Waldo Coleman; that Harry A. Olson, Jr., a director of the Fund, was a director of FAIMCO and a Vice President of FAC at the time of the transactions complained

of; and that defendant Fred H. Merrill was Chairman of the Fund in September 1968 and is currently an adviser to the Fund's Board of Directors and a director of FAIMCO.

22. Denies each and every allegation in paragraph 22 of the complaint except admits that the Fund has more than 23,000 shareholders within the United States and foreign countries and that their identity is subject to frequent changes, denies that any acts alleged in the complaint constitute violations of law; and respectfully refers to the statutes designated for a statement of their provisions.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

23. The rights of action purportedly set forth in the complaint did not accrue within four years next before the commencement of this action, and are barred by the applicable statutes of limitations.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

24. Plaintiff does not fairly and adequately represent the interests of the shareholders of the Fund in enforcing the alleged rights of the Fund.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

25. Plaintiff has not furnished adequate excuse for his failure to make an effort to obtain the action he desires from the directors of the Fund.

WHEREFORE, defendant demands judgment dismissing the complaint herein, together with the costs and disbursements of this action and such other relief as to the

Court seems just and proper.

Dated: August 9, 1974

SIMPSON THACHER & BARTLETT

By _____
A Member of the Firm

Attorneys for Defendant
American Express Investment
Fund, Inc.
Office and P. O. Address
One Battery Park Plaza
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(212) 483-9000

Answer of Defendants Fred H. Merrill, Reid W. Dennis and Herbert E. Dougall

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MONROE KORN, Plaintiff, -against- FRED H. MERRILL, REID W. DENNIS, S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY and RICHARD F. THARP, JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company), FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC., Defendants.	74 Civil 1862 (RLC) ANSWER

Defendants Fred H. Merrill, Reid W. Dennis and Herbert E. Dougall(hereinafter collectively referred to as "these defendants"), by their attorneys, Paul, Weiss, Rifkind, Wharton & Garrison, for their answer to the complaint herein allege as follows:

1(a). Answering the allegations of subparagraph 1(a) of the complaint, these defendants admit that plaintiff purports to base the jurisdiction of this Court on the Investment Company Act of 1940, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and the rules and regulations issued under said statutes. Except as herein expressly admitted,

these defendants deny each and every allegation of subparagraph 1(a) of the complaint.

(b) Answering the allegations of subparagraph 1(b) of the complaint, these defendants admit that plaintiff purports to base claims on the Investment Company Act of 1940, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and the rules and regulations issued under said statutes. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 1(b) of the complaint.

(c) These defendants deny each and every allegation of subparagraph 1(c) of the complaint.

2(a). Answering the allegations of subparagraph 2(a) of the complaint, these defendants admit the allegations contained in the last two sentences of said subparagraph. Except as herein expressly admitted, these defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph 2(a) of the complaint.

(b) Answering the allegations of subparagraph 2(b) of the complaint, these defendants admit that plaintiff purports to bring this action derivatively on behalf of American Express Investment Fund, Inc., formerly known as Commonwealth Investment Company (the "Fund") and its stockholders. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 2(b) of the complaint.

(c). These defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of subparagraph 2(c) of the complaint.

3(a). These defendants admit the allegations of subparagraph 3(a) of the complaint.

4. These defendants admit the allegations of paragraph 4 of the complaint and the subparagraphs thereof.

5(a). These defendants admit the allegations of subparagraph 5(a) of the complaint.

(b). Answering the allegations of subparagraph 5(b) of the complaint, these defendants refer to the investment advisory agreement between the Fund and Fund American Investment Management Company ("FAIMCO") for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 5(b) of the complaint.

(c). Answering the allegations of subparagraph 5(c) of the complaint, these defendants refer to the investment advisory agreement between the Fund and FAIMCO for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 5(c) of the complaint.

(d). Answering the allegations of subparagraph 5(d) of the complaint, these defendants refer to the investment

advisory agreement between the Fund and FAIMCO for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 5(d) of the complaint.

6-9. These defendants admit the allegations of paragraphs 6 through 9, inclusive, of the complaint and the subparagraphs thereof.

10. These defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 10 of the complaint.

11(a). These defendants admit the allegations of subparagraph 11(a) of the complaint.

(b) Answering the allegations of subparagraph 11(b) of the complaint, these defendants admit that F. A. Liquidating Corporation (sued herein under the name Fund American Companies ("FAC")) and American Express Company ("Amexco") entered into an agreement and plan of reorganization dated as of July 22, 1968 (the "Agreement"). These defendants refer to the Agreement for a statement of its provisions. Except as herein expressly admitted or otherwise treated, these defendants deny each and every allegation of subparagraph 11(b) of the complaint.

(c) Answering the allegations of subparagraph 11(c) of the complaint, these defendants refer to the Agreement for a statement of its provisions. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 11(c) of the complaint.

12(a). Answering the allegations of subparagraph 12(a) of the complaint, these defendants refer to §§ 15(a), 15(b), 2(a)(4) and 2(a)(9) of the Investment Company Act of 1940 for a statement of their provisions. These defendants admit that the investment advisory agreement and underwriting agreement were a principal source of income of FAIMCO. These defendants refer to the Agreement for a statement of its provisions. Except as herein expressly admitted or otherwise treated, these defendants deny each and every allegation of subparagraph 12(a) of the complaint.

(b). These defendants deny each and every allegation of subparagraph 12(b) of the complaint.

13(a). Answering the allegations of subparagraph 13(a) of the complaint, these defendants admit that the Fund issued, under date of August 16, 1968, a Notice of Special Meeting of Stockholders to be held on September 24, 1968, accompanied by a Proxy Statement. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 13(a) of the complaint.

(b). Answering the allegations of subparagraph 13(b) of the complaint, these defendants refer to the Notice of Special Meeting and Proxy Statement for a statement of their contents. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 13(b) of the complaint.

(c). Answering the allegations of subparagraph 13(c) of the complaint, these defendants refer to the Proxy

Statement for a statement of its contents. Except as herein otherwise treated, these defendants deny each and every allegation of subparagraph 13(c) of the complaint.

(d). Answering the allegations of subparagraph 13(d) of the complaint, these defendants admit that certain information in the Proxy Statement was supplied to the Fund by some of the sources alleged. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 13(d) of the complaint.

(e). Answering the allegations of subparagraph 13(e) of the complaint, these defendants admit that the Notice of Special Meeting and Proxy Statement were mailed to the stockholders of the Fund. These defendants further admit that stockholders of the Fund resided in the Southern District of New York and received the Proxy Statement in said District. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 13(e) of the complaint.

14(a). Answering the allegations of subparagraph 14(a) of the complaint, these defendants admit that at the Special Meeting of September 24, 1968 the stockholders of the Fund approved a new investment advisory agreement with FAIMCO. These defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that the stockholders of the Fund acted in reliance on the Proxy Statement. Except as herein expressly admitted or otherwise treated, these defendants deny each and every allegation of subparagraph 14(a) of the complaint.

(b). Answering the allegations of subparagraph 14(b) of the complaint, these defendants admit that the Board of Directors of the Fund approved a new underwriting agreement with FAIMCO. Except as herein expressly admitted, these defendants deny each and every allegation of subparagraph 14(b) of the complaint.

15. These defendants admit the allegations of paragraph 15 of the complaint.

16-17. These defendants deny each and every allegation of paragraphs 16 and 17 of the complaint and the subparagraphs thereof.

18. Answering the allegations of paragraph 18 of the complaint and the subparagraphs thereof, these defendants refer to the Proxy Statement of August 16, 1968 for a statement of its contents. Except as herein otherwise treated, these defendants deny each and every allegation of paragraph 18 of the complaint and the subparagraphs thereof.

19. Answering the allegations of paragraph 19 of the complaint, these defendants admit that certain information in the Proxy Statement was supplied to the Fund by some of the sources alleged. Except as herein expressly admitted, these defendants deny each and every allegation of paragraph 19 of the complaint.

20. These defendants deny each and every allegation of paragraph 20 of the complaint.

21. Answering the allegations of paragraph 21 of the complaint and the subparagraphs thereof, these defendants admit that Lewis V. Coleman, a director of the Fund, was a Senior Vice President of the Fund and a director and officer of FAIMCO at the time of the transactions complained of and is related to the defendant S. Waldo Coleman. These defendants further admit that Harry A. Olson, Jr., a director of the Fund, was a director of FAIMCO and a Vice President of FAC at the time of the transactions complained of. These defendants further admit that defendant Fred H. Merrill was Chairman of the Fund in September 1968 and is currently an adviser to the Fund's Board of Directors and a director of American Express Investment Management Company ("AEIMCO"). Except as herein expressly admitted, these defendants deny each and every allegation of paragraph 21 of the complaint and the subparagraphs thereof.

22. Answering the allegations of paragraph 22 of the complaint and the subparagraphs thereof, these defendants admit that the Fund has more than 24,000 shareholders scattered all over the United States and foreign countries, and that their identity is subject to frequent changes. These defendants deny that any acts alleged in the complaint constitute violations of law. These defendants refer to the Delaware corporate law for a statement of its provisions. Except as herein expressly admitted or otherwise treated, these defendants deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 22 of the complaint and the subparagraphs thereof.

FIRST DEFENSE

23. The rights of action purportedly set forth in the complaint did not accrue within four years next before the commencement of this action, and are barred by the applicable statutes of limitations.

SECOND DEFENSE

24. Plaintiff does not fairly and adequately represent the interests of the shareholders of the Fund in enforcing the alleged rights of the Fund.

THIRD DEFENSE

25. Plaintiff has not furnished adequate excuse for his failure to make an effort to obtain the action he desires from the directors and shareholders of the Fund.

FOURTH DEFENSE

26. Service of process upon these defendants was made by virtue of deputized service of process outside of the State of New York.

27. The United States District Court for the Southern District of New York is an improper venue for the institution of this action. Accordingly, deputized service of process outside of the State of New York was improper and insufficient and the Court has thus not acquired jurisdiction over the person of these defendants.

WHEREFORE, these defendants demand judgment dismissing the complaint herein, and awarding them the costs and disbursements of the action.

Dated: June 30, 1975

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____
A Member of the Firm

Attorneys for Defendants,
Fred H. Merrill, Reid W. Dennis
and Herbert E. Dougall
Office and P.O. Address
345 Park Avenue
New York, New York 10022
(212) 644-8000

Plaintiff's Interrogatories

Relating to Change of Venue

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MONROE KORN,

Plaintiff,

-against-

FRED H. MERRILL, et al.,

Defendants.

----------x

74 Civ. 1862 (RLC)

PLAINTIFF'S INTERROGATORIES

RELATING TO CHANGE OF VENUE

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, each defendant is requested to serve written answers to the following Interrogatories, separately, under oath.

Reference herein to any person, firm or corporation, including any of the parties to these actions, includes his or its employees, agents, directors, officers, partners, counsel and their accountants.

As used herein, and unless the context otherwise indicates, the following terms have the meanings indicated:

American Express - Defendant American Express Company.

FAIMCO - Defendant Fund American Investment Management Company and where applicable its successor American Express Investment Management Company and its predecessor North American Securities Company.

Contract - The Agreement and Plan of Reorganization entered into on or about July 22, 1968 between The Fund American Companies and American Express Company pursuant to which American Express Company, through a subsidiary, acquired substantially all the assets of The Fund American Companies.

FAC - Defendant the Fund American Companies and where applicable its predecessor Fireman's Fund Insurance Company.

EXHIBIT A

Fund - Defendant American Express Investment Fund, Inc. and where applicable its predecessor, Commonwealth Investment Company.

Identify and Describe - (a) When referring to a writing (other than an agreement), means a request to state the type of writing (e.g., letter, memorandum, minutes, etc.), the date of the writing, the present location and custodian of such writing and every copy thereof, together with a request to identify and describe the author, sender and every recipient of such writing or of a copy thereof.

(b) When referring to a person, means a request to state his or its name and present business and residence addresses and his or its relation, during the last five years, to any of the parties to these actions (e.g., as director, officer, partner, employee, agent, counsel or accountant).

Merger - The merger or other combination, whether contemplated, proposed, agreed to or consummated, between The Fund American Companies and American Express Company, or a subsidiary of American Express Company.

Writings - The originals, copies and drafts of any written, printed or phonetically recorded matter in the possession, custody or control of any of the defendants or their respective officers, directors, employees, agents, attorneys or accountants, including, but not limited to all of the following: letters, telegrams, other communications, memoranda, agreements, minutes and other records of meetings of stockholders, directors and directors' committees, the call of and agenda for any such meeting, financial statements, budgets, studies, reports, opinions, news releases, the text and summary of

any lectures, speeches and addresses, statistical data, book entries, accounting and cost records, schedules and work sheets.

Proxy Material - Letter to shareholders, Notice, Proxy Statement, exhibits and annexes.

1. (a) Identify by date, place and persons present each negotiating session and each meeting or discussion attended by any defendant or representative thereof concerning

(i) the Contract;

(ii) the Merger.

(b) Identify and describe the persons on whose behalf each such person acted.

2. Identify by date, place and persons present each meeting of the Board of Directors of American Express, FAIMCO, FAC and Fund concerning

(i) the Contract;

(ii) the Merger.

3. (a) Identify and describe each accounting firm which performed services for American Express in connection with

(i) the Contract;

(ii) the Merger.

(b) Identify and describe each person who performed services for each such accounting firm in connection with

(i) the Contract;

(ii) the Merger.

4. State the location of the writings and documents of American Express relating to

(i) the Contract;

(ii) the Merger.

5. For each of the following persons state whether within the last five years he

(a) Maintained a residence within the State of New York, New Jersey or Connecticut, and if so, list the addresses of each such residence and the dates it was or is so maintained;

(b) Maintained an office within the State of New York, New Jersey or Connecticut, and if so, list the address of each such office and the dates it was or is so maintained;

(c) Was affiliated with any business entity with an office within the States of New York, New Jersey or Connecticut, and if so, identify and describe each such business entity and list the position or positions held and the dates during which each such position was or is held:

Fred H. Merrill
Reid W. Dennis
Herbert E. Dougall
William Wallace Mein, Jr.
George E. Osborne
Richard F. Thorp
Harry A. Olson, Jr.
Thomas E. Terry

6. (a) Identify and describe each study and analysis of the business, value or affairs of

(i) FAIMCO

(ii) Fund

(iii) FAC

made during the period January 1, 1968 - December 31, 1968.

(b) Identify and describe each person who participated in the preparation of each such study or analysis.

7. (a) Identify and describe each law firm which represented each defendant in connection with

(i) the Contract;

(ii) the Merger.

(b) Identify and describe each person who acted on behalf of each such law firm in connection with

(i) the Contract;

(ii) the Merger.

8. Identify and describe each person who participated in the preparation of each of the following documents:

(a) the Contract;

(b) the Merger documents;

(c) the proxy material issued to shareholders of Fund under the date of August 16, 1968 for a shareholders meeting to be held on September 24, 1968;

(d) the proxy material issued to shareholders of FAC under the date of September 3, 1968 for a shareholders meeting to be held on September 27, 1968;

(e) the proxy material issued to shareholders of American Express under the date of September 3, 1968 for a shareholders meeting to be held on September 30, 1968.

Dated: New York, New York
June 27, 1974.

KAPLAN, KILSHEIMER & FOLEY

By: _____
A Member of the Firm
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017

TO: WINTHROP, STIMSON, PUTNAM & ROBERTS
40 Wall Street
New York, New York 10005
Attorneys for Defendant
American Express Company

SIMPSON THACHER & BARTLETT
One Battery Park Plaza
New York, New York 10004
Attorneys for Defendant
American Express Investment Fund, Inc.

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
345 Park Avenue
New York, New York 10022
Attorneys for Individual Defendants

Answers and Objections of

Defendants to Plaintiff's Inter-

rogatories Relating to Change of Venue

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MONROE KORN, Plaintiff,	:	
-against-	:	74 Civ. 1862 (R.L.C.)
FRED H. MERRILL, et al., Defendants.	:	

ANSWERS AND OBJECTIONS OF DEFENDANTS TO PLAINTIFF'S INTERROGATORIES RELATING TO CHANGE OF VENUE

Defendants American Express Company, American Express Investment Management Company, FA Liquidating Corp. and American Express Investment Fund, Inc. provide the following Answers or Objections to Plaintiff's Interrogatories Relating to Change of Venue.

As used herein, the following terms have the meanings indicated:

Amexco	-	American Express Company.
Amexco offices	-	The offices of Amexco at 65 Broadway, New York, New York.
FAIMCO	-	Fund American Investment Management Company, now known as American Express Investment Management Company.
FAC	-	The Fund American Companies, now known as FA Liquidating Corp.
FFIC	-	Fireman's Fund Insurance Company.

FAC offices - The offices of FAC and FFIC located at 3333 California Street, San Francisco, California.

Fund - Commonwealth Investment Company, now known as American Express Investment Fund, Inc.

CL&M offices - The offices of the law firm of Carter, Ledyard & Milburn located at 2 Wall Street, New York, New York.

OHR&S offices - The offices of the law firm of Orrick, Herrington, Rowley & Sutcliffe formerly located at 405 Montgomery Street and presently located at 600 Montgomery Street, San Francisco, California.

Contract and Merger are used in the same manner as in plaintiff's Interrogatories.

The identification and description of those persons referred to in the Answers to Interrogatories are set forth in Appendix A hereto.

1. According to records and other information available to defendants, prior to the Merger on October 31, 1968 the following meetings occurred which were attended by both one or more representatives of Amexco and one or more representatives of FAC. Other meetings may also have occurred, the details of which are not presently obtainable.

Date	Place	Persons Present
September 15, 1967	Amexco offices	H. L. Clark, Merrill, Morton
Mid-October, 1967	Amexco offices	Merrill, Morton, possibly H.L. Clark and J.H. King

Date	Place	Persons Present
November, 1967	FAC offices; other San Francisco locations	J.S. Anderson, Merrill, Olson, Newton
December 13, 1967	Amexco offices	H. L. Clark, Merrill, Morton, J.S. Anderson
January 16, 1968	Amexco offices	Merrill, Morton
January or February 1968	FAC offices	Merrill, unidentified representatives of McKinsey & Company, Inc.
February, 1968	Amexco offices	Morton, Pfifer, Olson Tharp
March, 1968	FAC offices	Morton, Pfifer, Merrill, Tharp
March 4, 1968	Amexco offices	H.L. Clark, Morton, Merrill
March 22, 1968	Amexco offices	H.L. Clark, Crafts, Merrill, Morton, J.H. King, Black
March 26, 1968	River Club, New York, N.Y.	Clay, Henley, J.H. King, H.L. Clark, Morton, Owen, Page, Merrill, Niggeman, Cowan, J.B. Clark, Crafts, Kipp, Calhoun, Blanchard, Henderson, Miller, Pfifer, Hagendorn
Late March or early April, 1968	Amexco offices	Tharp, Pfifer
April 3, 4, 1968	Pacific Union Club, San Francisco California	H.L. Clark, Merrill, Morton, Pfifer, unidentified Amexco and FAC representatives
June, 1968	New York City	Tharp, Newton
June 5, 1968	Amexco offices and Links Club, New York, N.Y.	McClung, Grew, Cedarbaum, Blanchard, Miller, Pfifer, Waters, Banker, Barton, Crowley, Cuccinello, Hagendorn, Pratt, Stillson White, Merrill, Cooney, Olson, Tharp, Sutcliffe, H.L. Clark, Morton, Maynard
June 21, 1968	Securities and Exchange Commission, Washington, D.C.	Tharp, Venter, Maynard, White, Pfifer, representatives of S.E.C.

Date	Place	Persons Present
June 21, 1968	FAC offices	H.L. Clark, FAC directors
June 26, 1968	Amexco offices	H.L. Clark, Merrill, Crafts, Niggeman, Miller, Blanchard, Henderson
June 27, 1968	Amexco offices	H.L. Clark, Merrill
July 9, 1968	Securities and Exchange Commission, Washington, D.C.	Tharp, Bruck, Pfifer, representatives of S.E.C.
July 12, 1968	Securities and Exchange Commission, Washington, D.C.	Bruck, White, Maynard, Pfifer, representatives of S.E.C.
July 25, 1968	Amexco offices	H.L. Clark, Merrill, Pfifer, Blanchard, Anderson, Stillson, Olson
July, 1968	Amexco offices	K. King, unidentified Amexco representatives
August 12-17, 1968	OHR&S offices and FAC offices	Daly, Sutcliffe, Benedict, Terry
September 12, 1968	Amexco offices	H.L. Clark, Morton, Pfifer, Hagendorn, White, Stillson, Cuccinello, Merrill, Tharp, Venter, Nadd, Ensign, Maynard, D. Anderson, J.S. Anderson, Jeffrey
September 13, 1968	Amexco offices	H.L. Clark, Merrill, Morton, Blanchard, Miller, D. Anderson, J.S. Anderson, Crowley, Jeffrey, Stillson, Cuccinello
September 16, 1968	Amexco offices	Niggeman, Henderson, Banker, Mundy, Lohse
September 20, 1968	FAC offices	H.L. Clark, FAC directors
September 24, 1968	Amexco offices and Links Club, New York, N.Y.	H.L. Clark, Merrill, Morton, Niggeman, Crafts

Date	Place	Persons Present
October 3, 1968	Amexco offices and Wall Street Club, New York, N.Y.	H.L. Clark, Tharp, Morton, White
October 31, 1968	OHR&S offices	Cooney, Benedict, Grimes, Miller, Hagendorn, Crafts, Jr., Webber, Cedarbaum, Daly, bank representatives

Reference is made to the Answer to Interrogatory 2 for a listing of the meetings of the Boards of Directors of Amexco, FAC or the Fund at which the Contract and/or the Merger were discussed.

A special meeting of the shareholders of Amexco relating to the Merger was held on September 30, 1968 at the Amexco offices. A special meeting of the shareholders of FAC relating to the Merger was held on September 27, 1968 at the FAC offices. A special meeting of the shareholders of the Fund relating indirectly to the Merger was held on September 24, 1968 at the FAC offices.

In addition to the meetings referred to above, there were numerous internal meetings among officers, employees and/or other representatives of Amexco relating to the Contract and/or Merger, most of which meetings were held either at the Amexco offices or at the CL&M offices. Similarly, there were numerous internal meetings among officers, employees and/or other representatives of FAC relating to the Contract and/or Merger, most of which were held either at the FAC offices or at the OHR&S offices. Defendants Amexco and FAC object to Interrogatory 1 to the extent that it seeks information as to such meetings in addition to that furnished herein, on the ground of the extreme burdensomeness and difficulty in obtaining such information and

its lack of relevance to the pending motion to transfer, to which the Interrogatories purportedly relate.

2.

Corporation	Date	Place	Directors Present
Amexco	March 25, 1968	Amexco offices	Ammidon, Black, H.L. Clark, Clay, Etherington, Henley, J.H. King, Morton, Owen, Page
Amexco	May 27, 1968	Amexco offices	Ammidon, Black, H.L. Clark, Clay, Henley, J.H. King, Morton, Etherington, Page, Reed, Stone
FAC	May 29, 1968	FAC offices	Merrill, Adams, Cochran, Crafts, Gerdes, Levison, Niggeman, Sterling
FAC	June 11, 1968	FAC offices	Crafts, Brawner, Cochran, Merrill, Niggeman, Peterson
FAC	June 17, 1968	FAC offices	Merrill, Brawner, Cochran, Crafts, Follis, Gerdes, Levison, Loebbecke, Niggeman, Peterson, Sterling, Whitman
Fund	June 18, 1968	FAC offices	Coleman, Dennis, Dougall, Mein, Merrill, Osborne, Ray, Tharp
FAC	June 21, 1968	FAC offices	Merrill, Adams, Brawner, Cochran, Cowan, Crafts, Follis, Gerdes, Levison, Loebbecke, Niggeman, Sterling, Whitman
Amexco	June 24, 1968	Amexco offices	Ammidon, Black, H.L. Clark, Clay, Henley, J.H. King, Morton, Owen, Page, Reed, Roosa, Stone

Corporation	Date	Place	Directors Present
FAC	July 19, 1968	FAC offices	Merrill, Adams, Brawner, Calhoun, Cochran, Crafts, Follis, Gerdes, Levison, Loebbecke, Niggeman, Peterson, Sterling, Van Orman, Whitman
Amexco	July 22, 1968	Amexco offices	Ammidon, H.L. Clark, Clay, Etherington, Henley, J.H. King, Morton, Owen, Page, Reed Roosa, Stone
FAC	July 30, 1968	FAC offices	Crafts, Brawner, Cochran, Merrill Whitman
FAC	August 16, 1968	FAC offices	Merrill, Adams, Brawner, Cochran Crafts, Follis, Levison, Loebbecke, Niggeman, Peterson, Sterling, Whitman
Amexco	August 26, 1968	Amexco offices	Ammidon, Black, H.L. Clark, Clay Etherington, Henley, Morton, Owen, Page, Reed
FAC	September 10, 1968	FAC offices	Crafts, Brawner, Cochran, Merrill Niggeman, Peterson, Whitman
FAC	September 20, 1968	FAC offices	Merrill, Adams, Brawner, Calhoun J.B. Clark, Cochran, Crafts, Follis, Levison, Loebbecke, Niggeman, Peterson, Sterling, Whitman
Amexco	September 23, 1968	Amexco offices	Ammidon, H.L. Clark, Clay, J.H. King, Etherington, Henley, Morton, Owen, Page, Reed, Roosa, Stone

Corporation	Date	Place	Directors Present
FAC	October 17, 1968	FAC offices	Crafts, Brawner, J.B. Clark, Cochran, Merrill, Niggeman, Peterson, Whitman
FAC	October 18, 1968	FAC offices	Merrill, Adams, Brawner, Calhoun, J.B. Clark, Cochran, Cowan, Crafts, Gerdes, Kipp, Levison, Loebbecke, Niggeman, Peterson, Sterling, Van Orman, Whitman
FAC	October 31, 1968	FAC offices	Merrill, Adams, Brawner, Cochran, Crafts, Follis, Levison, Niggeman, Whitman

3. The accounting firm of Price Waterhouse & Co., 60 Broad Street, New York, New York, performed services for Amexco in connection with the Contract and Merger. The persons at such firm who performed the services were Robert M. Maynard and Leon M. Nadd who were and still are partners of the firm.

4. The writings and documents of Amexco relating to the Contract and Merger are located at Amexco's offices and at the CL&M offices.

5. None of the eight mentioned individuals maintained a residence within the States of New York, New Jersey or Connecticut during the past five years, with the exception of Harry A. Olson, Jr., who resided at Tatum Drive, Middletown, New Jersey during the period from January, 1969 to October, 1972.

None of the eight mentioned individuals maintained an office within the States of New York, New Jersey or Connecticut

during the past five years, except that Harry A. Olson, Jr. maintained an office at the Amexco offices during the period from January 1969 to October 1972.

During the past five years neither Herbert E. Dougall nor George E. Osborne was affiliated with a business entity with an office within the States of New York, New Jersey or Connecticut.

During the past five years William Wallace Mein, Jr. was affiliated with no business entity with an office within the States of New York, New Jersey or Connecticut, except that he served during such period as a director of The Flintkote Company, whose principal place of business is in White Plains, New York.

During the past five years Thomas E. Terry was affiliated with no business entity with an office within the States of New York, New Jersey or Connecticut except for his affiliation with FAIMCO, which maintained a sales office at 110 William Street, New York, New York from prior to 1968 until September 28, 1973. The office was staffed by approximately four employees of FAIMCO, who transmitted orders for the purchase of shares of the Fund to FAIMCO's principal office in San Francisco, where such orders were accepted. Mr. Terry was Secretary and Treasurer of FAIMCO from 1968 until September 10, 1970, at which time he assumed his present title of Vice President and Secretary, Treasurer. Mr. Terry has been employed by FAIMCO only at its principal office in San Francisco.

During the past five years Reid W. Dennis was affiliated with no business entity with an office within the States of New York, New Jersey or Connecticut except as follows: He was a

director of FAIMCO from prior to 1968 until August 1, 1973. He was President of FAIMCO from prior to 1968 until September 14, 1972, and Chairman of FAIMCO from September 14, 1972 until August 1, 1973. He has had no affiliation with FAIMCO since August 1, 1973. Mr. Dennis was employed by FAIMCO only at its principal office in San Francisco. During the past five years Mr. Dennis has been a director of Recognition Equipment Inc., a corporation with its principal office in Dallas, Texas, which maintains an office in New York City. Mr. Dennis is currently Chairman of Recognition Equipment Inc.

During the past five years Richard F. Tharp was affiliated with no business entity with an office within the States of New York, New Jersey or Connecticut except as follows: He has been a director of FAIMCO from prior to 1968 until the present. He was a Vice President of FAIMCO from prior to 1968 until October 7, 1971. During the past five years Mr. Tharp has been Senior Vice President of FFIC. He was at various times during the past five years a director and/or officer of the following subsidiaries or affiliates of FFIC: National Surety Corporation (New York), National Surety Corporation (Illinois), The American Insurance Company, and Fireman's Fund American Life Insurance Company. FFIC and such subsidiaries or affiliates have maintained offices in New York, New Jersey and Connecticut during the past five years. Mr. Tharp has been employed by said companies only at their San Francisco offices.

During the past five years Fred H. Merrill was affiliated with no business entity with an office within the States of New York, New Jersey or Connecticut except as follows: He has

been a director of FAIMCO from prior to 1968 until the present. He was Chairman of FAIMCO from prior to 1968 until September 14, 1972. He was Chairman of the Executive Committee, and a director, of Amexco from 1968 until April 1972. He was Chairman of the Executive Committee of FFIC from 1969 until February 1972 and has been a director of FFIC from 1969 until the present. He was at various times during the past five years a director and/or officer of the following subsidiaries or affiliates of FFIC: National Surety Corporation (New York), National Surety Corporation (Illinois), American Automobile Insurance Company, The American Insurance Company, Associated Indemnity Corporation, Fireman's Fund American Life Insurance Company and Fireman's Fund American Life Insurance Company of New York. FFIC and such subsidiaries or affiliates have maintained offices in New York, New Jersey and Connecticut during the past five years. Mr. Merrill was employed by said companies only at their San Francisco offices.

During the past five years Harry A. Olson, Jr. was affiliated with no business entity with an office within the States of New York, New Jersey or Connecticut except as follows: He was a Vice President of Amexco from January 1969 until September 1972. He has been a director of FAIMCO from prior to 1968 until the present, and has been President of FAIMCO since September 14, 1972. Mr. Olson has been employed by FAIMCO only at its principal office in San Francisco.

6. The information requested by Interrogatory 6 is set forth in Appendix B hereto.

Defendants do not construe Interrogatory 6 to include

reports to stockholders by the companies in question, press releases, or financial reports to the Boards of Directors prepared by accounting personnel.

7. Amexco was represented by the law firm of Carter, Ledyard & Milburn in connection with the Contract and Merger. The persons who acted on behalf of that firm were Richard G. McClung, Francis M. Ellis, Robert R. Grew, Bernard Cedarbaum and Willis L. Ensign, members of the firm and Jeffrey N. Daly, an associate of the firm. Messrs. McClung, Ellis, Grew and Cedarbaum are still members of the firm; Mr. Ensign is deceased; Mr. Daly is no longer employed by the firm.

FAC was represented by the law firm of Orrick, Herrington, Rowland & Sutcliffe in connection with the Contract and Merger. The persons who acted on behalf of that firm were Eric Sutcliffe, William D. McKee, James F. Crafts, Jr. and Paul A. Webber, members of the firm, and M. Peter Lillevand, an associate of the firm. Messrs. Sutcliffe, McKee, Crafts and Webber are still members of the firm, and Mr. Lillevand is now a member of the firm.

No law firm represented any defendant other than Amexco or FAC in connection with the Contract or Merger.

8. The persons who participated in the preparation of the Contract were Messrs. Grew, Ellis, Cedarbaum, Sutcliffe, McKee, Crafts, Webber and Tharp.

The persons who participated in the preparation of the Merger documents were Messrs. Grew, Ellis, Cedarbaum, Sutcliffe, McKee, Crafts, Webber and Tharp.

The person who participated in the preparation of the

proxy material issued to shareholders of the Fund and dated August 16, 1968 was Mr. Terry.

The proxy material issued to shareholders of FAC and Amexco under date of September 3, 1968 was substantially identical. The persons who participated in the preparation of such documents were Messrs. McClung, Ellis, Grew, Cedarbaum, Sutcliffe, McKee, Crafts, Webber, Merrill, Niggeman, Tharp, Cooney, Olson, Grimes, Miller, Hagendorn, Crowley, White, Clark, Morton, Pfifer, Blanchard, Lively, Stewart, Howland, Henderson, Stillson, Cuccinello and O'Brien.

Signatures as to Answers:

AMERICAN EXPRESS COMPANY

By _____
Assistant Secretary

FA LIQUIDATING CORP.
(Formerly The Fund American Companies)

By _____
Senior Vice President, General Counsel and Secretary

AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY (Formerly Fund American Investment Management Company)

By _____
Vice President and Secretary, Treasurer

AMERICAN EXPRESS INVESTMENT FUND, INC.
(Formerly Commonwealth Investment Company)

By _____
Vice President and Secretary, Treasurer

Signatures as to Objections:

WINTHROP, STIMSON, PUTNAM & ROBERTS

By _____
A Member of the Firm
Attorneys for Defendants
American Express Company,
FA Liquidating Corp. (formerly
The Fund American Companies) and
American Express Investment Management Company

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN E. O'BRIEN, being duly sworn, deposes and says that he is an Assistant Secretary of American Express Company; that he has read the foregoing Answers to Interrogatories and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief insofar as they relate to said corporation.

John E. O'Brien

Sworn to before me this
25th day of July, 1974

Notary Public

STEPHEN P. NORMAN
Notary Public, State of New York
No. 60-8157200
Qualified in Westchester County
Cert. Filed in New York County
Commission Expires March 30, 1976

STATE OF CALIFORNIA)
: ss.:
COUNTY OF SAN FRANCISCO)

ROBERT P.J. COONEY, being duly sworn, deposes and says that he is Senior Vice President, General Counsel and Secretary of FA Liquidating Corp. (formerly The Fund American Companies); that he has read the foregoing Answers to Interrogatories and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief insofar as they relate to said corporation.

Robert P.J. Cooney

Sworn to before me this
23 day of July, 1974

Notary Public

I. V. LINDSKOOG
NOTARY PUBLIC – CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires Sept. 23, 1977

STATE OF CALIFORNIA)
: ss.:
COUNTY OF SAN FRANCISCO)

THOMAS E. TERRY, being duly sworn, deposes and says that he is Vice President and Secretary, Treasurer of American Express Investment Management Company and of American Express Investment Fund, Inc .; that he has read the foregoing Answers to Interrogatories and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief insofar as they relate to said corporations.

Thomas E Terry
Thomas E. Terry

Sworn to before me this
23 day of July, 1974

Isabelle V. Lindskoog
Notary Public

I. V. LINDSKOOG
NOTARY PUBLIC – CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires Sept. 23, 1977

APPENDIX A

Identification and Description of Persons Referred To

Name	Business Address	Residence Address	Relationship to Party
Edwin E. Adams	400 California Street San Francisco, California	424 El Centro Road Hillsborough, California	FAC director
Hoyt Ammidon	U.S. Trust Company of New York 45 Wall Street New York, N.Y.	74 Goose Hill Road Cold Springs Harbor, New York	Amexco director
Douglas Anderson	Not known	Not known	Amexco officer Resigned November 16, 1970
John S. Anderson	550 Laurel Street San Francisco, California	2228 Clay Street San Francisco, California	Amexco officer Resigned - January, 1974
Brooks Banker	Amexco offices	55 East Ninth Street New York, N.Y.	Amexco officer; FAIMCO director
Thomas H. Barton	Not known	1192 Park Avenue New York, N.Y.	Amexco officer Resigned - August, 1971
Francis W. Benedict	FAC offices	10 Fowler Court San Rafael, California	Former FAC officer; FFIC officer
Eugene R. Black	Amexco offices	178 Columbia Heights Brooklyn, New York	Amexco consultant since June 1970; Amexco director; Retired - May, 1970
Richard F. Blanchard	Amexco offices	Canfield Road Box 76 Convent Station, New Jersey	Amexco officer

Name	Business Address	Residence Address	Relationship to Party
A. H. Brawner	Federal Reserve Bank San Francisco, California	1260 Westridge Drive Portola Valley, California	Former FAC director
A. Jay Bruck	John F. Forbes & Co. 111 Sutter Street San Francisco, California	3455 Pierce Street San Francisco, California	Partner in accountants for FAC
David R. Calhoun	Deceased	Deceased	Former Amexco director Former FAC director
Bernard Cedarbaum	CL&M offices	125 Brewster Road Scarsdale, New York	Partner in outside counsel for Amexco
Lucius D. Clay	Not known	Not known	Amexco director Retired - January, 1969
Howard L. Clark	Amexco offices	607 Riversville Road Greenwich, Connecticut	Chairman of the Board and Chief Executive Officer of Amexco
John B. Clark	430 Park Avenue New York, N.Y.	800 Park Avenue New York, N.Y.	Amexco director Retired - April, 1969 Former FAC director
Dwight M. Cochran	235 Montgomery Street Hillsborough, California	711 Eucalyptus Hillsborough, California	FAC director
S. Waldo Coleman	Deceased	Deceased	Former Fund director
Robert P. J. Cooney	FAC offices	2618 Buchanan Street San Francisco, California	FAC officer; FFIC officer
Robert G. Cowan	Midlantic National Bank 744 Broad Street Newark, New Jersey	Post Road Bernardsville, New Jersey	Amexco director; FAC director
James F. Crafts	580 California Street San Francisco, California	1945 Pacific Avenue San Francisco, California	Former FAC director Former Amexco director

Name	Business Address	Residence Address	Relationship to Party
James F. Crafts, Jr.	OHR&S offices	440 Pine Hill Road Hillsborough, California	Partner in outside counsel for FAC
Donald A. Crowley	Amexco offices	104 Edgemont Road Scarsdale, New York	Amexco officer
Charles A. Cuccinello	Amexco offices	25 Dogwood Drive Scarsdale, New York	Amexco officer
Jeffrey N. Daly	Not known	Not known	Former associate of outside counsel for Amexco
Reid W. Dennis	3000 Sand Hill Road Menlo Park, California	225 Mountain Wood Lane Woodside, California	Fund director; former Fund officer and FAIMCO officer and director
Herbert E. Dougall	Graduate School of Business Stanford University Stanford, California	15 Holden Court Portola Valley, California	Fund director
Philip H. Dutter	McKinsey & Company, Inc. 245 Park Avenue New York, N.Y.	Not known	Representative of consultant to Amexco
R. Gwin Follis	225 Bush Street San Francisco, California	3690 Washington Street San Francisco, California	FAC director
Francis M. Ellis	CL&M offices	245 West 11th Street New York, N.Y.	Partner in outside counsel for Amexco
Edwin D. Etherington	P.O. Box 486 Old Lyme, Connecticut	Sill Lane Old Lyme, Connecticut	Amexco director
Robert H. Gerdes	77 Beal Street San Francisco, California	61 King Avenue Piedmont, California	FAC director

Name	Business Address	Residence Address	Relationship to Party
Robert R. Grew	CL&M offices	8 East 96th Street New York, N.Y.	Partner in outside counsel for Amexco
Bartlett T. Grimes	FAC offices	Upper Road Ross, California	Former FAC officer FFIC officer
William H. Hagendorn	Shearman & Sterling 399 Park Avenue New York, N.Y.	120 East 81st Street New York, N.Y.	General Counsel of Amexco; Resigned - October, 1973
Fred Hass	FAC offices	300 Darien Way San Francisco, California	Former FAC officer FFIC officer
James A. Henderson	Amexco offices	444 East 52nd Street New York, N.Y.	Amexco officer
Henry H. Henley, Jr.	Cluett, Peabody & Co., Inc. 510 Fifth Avenue New York, N.Y.	89 Brookby Road Scarsdale, New York	Amexco director
Richard B. Howland	Not known	1001 Wyandotte Trial Westfield, New Jersey	Amexco officer Resigned - January, 1970
Jeffrey E. Jeffrey	Amexco offices	Black Point Horseshoe Rd. Rumson, New Jersey	Amexco employee
Joseph H. King	Blyth Eastman Dillon & Co. Incorporated 1 Chase Manhattan Plaza New York, N.Y.	800 Park Avenue New York, N.Y.	Amexco director Retired - April, 1974

Name	Business Address	Residence Address	Relationship to Party
Kenneth King	1600 Sherman Street Denver, Colorado	Not known	Former FAC officer
Donald K. Kipp	570 Broad Street Newark, New Jersey	Spring Valley Road Morristown, New Jersey	FAC director
John G. Levison	127 Montgomery Street San Francisco, California	850 Powell Street San Francisco, California	Former FAC director
M. Peter Lillevand	OHR&S offices	2 Fallen Leaf San Anselmo, California	Partner in outside counsel for FAC
Michael E. Lively	Amexco offices	Highview Road Darien, Connecticut	Amexco officer
Ernest J. Loebbecke	433 S. Spring Street Los Angeles, California	2000 Brae Burn Road Altadena, California	Amexco director FAC director
Austin W. Lohse	Not known	7 Taylor Road Short Hills, New Jersey	Officer of Amexco subsidiary - Resigned
Robert M. Maynard	Price Waterhouse & Co. 60 Broad Street New York, N.Y.	Not known	Partner in accountants for Amexco
Richard G. McClung	CL&M offices	30 Winding Lane Greenwich, Connecticut	Partner in outside counsel for Amexco
William D. McKee	OHR&S offices	1271 Redwood Lane Lafayette, California	Partner in outside counsel for FAC

Name	Business Address	Residence Address	Relationship to Party
William Wallace Mein, Jr.	215 Market Street San Francisco, California	1308 Canada Road Woodside, California	Fund director
Woodward Melone	FAC offices	1713 Indian Valley Road Novato, California	None
Fred H. Merrill	One Embarcadero Center San Francisco, California	2222 Hyde Street San Francisco, California	FAIMCO director Former FAIMCO officer Fund adviser Former Fund officer and director Former Amexco officer and director FAC director Former FAC officer
Hasbrouck B. Miller	Amexco offices	Fox Hollow Road Convent Station New Jersey	Amexco officer
William H. Morton	Amexco offices	North Manursing Island Rye, New York	President and director of Amexco
Joseph T. Mundy	Amexco offices	2617 Martin Avenue Bellmore, New York	Amexco officer
Leon M. Nadd	Price Waterhouse & Co. 60 Broad Street New York, N.Y.	Not known	Partner in accountants for Amexco
Theodore J. Newton, Jr.	Blyth Eastman Dillon & Co. Incorporated 1 Chase Manhattan Plaza New York, N.Y.	Not known	Representative of consultant to Amexco
Louis W. Niggeman	Deceased	Deceased	Former FAC director and officer Former Amexco director

Name	Business Address	Residence Address	Relationship to Party
John E. O'Brien	Amexco offices	866 Dorian Road Westfield, New Jersey	Amexco officer
Harry A. Olson, Jr.	550 Laurel Street San Francisco, California	135 Porto Marina Drive Tiburon, California	Former FAC officer Former Amexco officer FAIMCO and Fund officer and director
George E. Osborne	University of California Hastings College of Law San Francisco, California	624 Taylor Street San Francisco, California	Former Fund director
Ralph Owen	Third National Bank Building Nashville, Tennessee	104 Lynwood Blvd. Nashville, Tennessee	Amexco director
Frederick W. Page	Not known	184 Forest Avenue Glen Ridge, New Jersey	Amexco director Retired - April, 1973
Rudolph A. Peterson	Bank of America Center San Francisco, California	86 Sea View Avenue Piedmont, California	FAC director
George T. Pfifer	Not known	22 Colt Street Summit, New Jersey	Amexco officer Resigned - September, 1968
Alan C. Pratt	Not known	47 Old Farm Road Darien, Connecticut	Amexco officer Resigned - March, 1969
Philip A. Ray	Deceased	Deceased	Former Fund director
Philip D. Reed	375 Park Avenue, Rm. 2709 New York, N.Y.	Sunset Lane Rye, New York	Amexco director Retired - April, 1972
Robert V. Roosa	Brown Brothers Harriman & Co. 59 Wall Street New York, N.Y.	30 Woodlands Road Harrison, New York	Amexco director

Name	Business Address	Residence Address	Relationship to Party
J. E. Wallace Sterling	Stanford University Stanford, California	2220 Stockridge Woodside, California	FAC director
Robert L. Stillson III	Amexco offices	Kennaday Road Mendham, New Jersey	Amexco officer
Whitney Stone	Stone & Webster, Inc. 90 Broad Street New York, N.Y.	965 Fifth Avenue New York, N.Y.	Amexco director
Eric Sutcliffe	OHR&S offices	260 King Avenue Piedmont, California	Partner in outside counsel for FAC
Thomas E. Terry	550 Laurel Street San Francisco, California	27 Twin Oaks Avenue San Rafael, California	FAIMCO and Fund officer
Richard F. Tharp	FAC offices	Quadra Island British Columbia Canada	FAC officer FAIMCO director Former FAIMCO officer Former Fund director and officer
Francis Van Orman	15 Washington Street Newark, New Jersey	83 Old Short Hills Road Short Hills, New Jersey	Former FAC director
John E. Venter	John F. Forbes & Co. 111 Sutter Street San Francisco, California	210 Laurel San Francisco, California	Partner in accountants for FAC
George W. Waters	Amexco offices	124 Rumson Road Rumson, New Jersey	Amexco officer
Paul A. Webber	OHR&S offices	292 Chestnut Street San Francisco, California	Partner in outside counsel for FAC
Jack E. White	Amexco offices	7 Parker Court Florham Park New Jersey	Amexco officer
Frederic B. Whitman	None	5727 La Salle Avenue Oakland, California	Former FAC director

APPENDIX B

Answer to Interrogatory 6

Date	Nature of Document	Author	Recipient	Present Location
Undated	Memorandum consisting of six statements relating to possible merger	Pratt, Newton, J.S. Anderson, Barton, Morton, Blanchard	Not stated	Amexco offices
Jan. 9, 1968	Memorandum entitled "Advantages of Insurance Acquisition"	Barton	Not stated	Amexco offices
Feb. 13, 1968	Memorandum entitled "The Fund American Companies - History of Development and Future Potentials of the Financial Services Holding Company"	Tharp and Olson	Amexco Senior Management	Amexco offices FAC offices
Mar. 13, 1968	Study entitled "Property Casualty Industry Trends and Candidate's Profit Outlook"	McKinsey & Company, Inc. New York, N.Y.	Not stated	Amexco offices FAC offices
March 26, 1968	Letter	Dutter	H. L. Clark	Amexco offices
Apr. 17, 1968	Memorandum entitled "Fund American Companies"	Pfifer	Not stated	Amexco offices
Apr. 29, 1968	Memorandum entitled "A Company, F Company"	Morgan Guaranty Trust Company of New York, New York, N.Y.	Morton	Amexco offices FAC offices

Date	Nature of Document	Author	Recipient	Present Location
May 13, 1968	Memorandum entitled "Morgan Guaranty Report - April 29, 1968"	Tharp	Merrill	Amexco offices FAC offices
June, 1968	Study relating to advantages and disadvantages of possible merger	Newton	Not stated	Amexco offices
June 7, 1968	Memorandum entitled "Fund American Merger"	Pfifer	File	Amexco offices
June 18, 1968	Memorandum entitled "Project 70 - Condensed Comments"	Melone	Niggeman	Amexco offices FAC offices
June 24, 1968	Memorandum entitled "Basic Changes that Improve the Outlook for Fire-Casualty Profits"	Newton	Not stated	Amexco offices
July 3, 1968	Memorandum entitled "Utilization of Tax Loss Carryforward"	Pfifer	H. L. Clark	Amexco offices
Aug. 12, 1968	Memorandum entitled "Federal Income Tax Considerations Involved in Determination of Effective Date of Proposed Amalgamation with Fund American Companies"	Price Waterhouse & Co. New York, N. Y.	Not stated	Amexco offices FAC offices

Date	Nature of Document	Author	Recipient	Present location
Aug. 16, 1968	Memorandum entitled "Federal Tax Planning - American Express - Fund American Reorganization	Hass	File	Amexco offices FAC offices
Aug. 26, 1968	Letter relating to review of certain reserves and liabilities of U.S. insurance subsidiaries of Fund American Companies	Price Waterhouse & Co. New York, N.Y.	H. L. Clark	Amexco offices
Sept. 5, 1968	Memorandum entitled "Acquisitions of Fire and Casualty Insurance Companies"	Morgan Guaranty Trust Company of New York, New York, N.Y.	H. L. Clark	Amexco offices
Sept. 6, 1968	Letter	Venter	Tharp	Amexco offices FAC offices
Sept. 10, 1968	Memorandum entitled "Fund American and American Express Effective Date of Reorganization"	Tharp	Merrill	Amexco offices FAC offices

Affidavit of Thomas E. Terry

in Support of Motion, Pursuant to

28 U.S.C. §1404(a), to Transfer Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

MONROE KORN, :

Plaintiff, :

-against- :

FRED H. MERRILL, et al., :

Defendants. :

- x

74 Civ. 1862 (RLC)

AFFIDAVIT

STATE OF CALIFORNIA)
: ss.:
COUNTY OF SAN FRANCISCO)

THOMAS E. TERRY, being duly sworn, deposes and says:

1. I reside at 27 Twin Oaks Avenue, San Rafael, California and am a member of the Bar of the State of Wisconsin. I am currently Vice President and Secretary, Treasurer of American Express Investment Fund, Inc. (the "Fund"), and of American Express Investment Management Company ("AEIMCO"), two of the defendants in the above-entitled action. During 1968, at the time of the transactions complained of in this action, I was Secretary and Treasurer of the Fund (then known as Commonwealth Investment Company) and of AEIMCO (then known as Fund American Investment Management Company ("FAIMCO")).

2. I make this affidavit in support of a motion, pursuant to 28 U.S.C. § 1404(a), to transfer this action from the United States District Court for the Southern District of New York to the United States District Court for the Northern

District of California, for the convenience of parties and witnesses and in the interests of justice.

3. The Fund, the corporation on whose behalf this derivative action has purportedly been commenced, is a Delaware corporation with its principal place of business at 550 Laurel Street, San Francisco, California 94120. The Fund has no present office for the transaction of business and has never qualified to transact business in the Southern District of New York. All of the current officers and directors of the Fund are residents of the Northern District of California. As of September 28, 1973 (the latest date for which a computation has been made), of 24,478 holders of record of the capital stock of the Fund, 7,643 holders had California addresses, whereas only 2,345 holders had New York State addresses. The holders of record with California addresses were substantially greater than the holders of record with addresses in any other single state. Of the 19,211,830 shares of capital stock of the Fund outstanding as of September 28, 1973, 7,059,587 shares were registered to California addresses and 1,533,396 shares were registered to New York State addresses.

4. AEIMCO is a California corporation with its principal place of business at 550 Laurel Street, San Francisco, California 94120. AEIMCO has no present office for the transaction of business and has never qualified to transact business in the Southern District of New York.

5. A trial of this action in the Southern District of New York, rather than in the Northern District of California,

would necessarily entail substantial inconvenience and expense for both the Fund and AEIMCO. It is presently anticipated that Harry A. Olson, Jr., President of the Fund and of AEIMCO, and myself would be witnesses at a trial. Attendance at a trial in New York of myself and Mr. Olson would obviously be far more burdensome than our attendance at a trial in the Northern District of California, where Mr. Olson and I are employed and reside, and would necessarily take more time away from the performance of our duties as officers of the Fund and AEIMCO. Moreover, all the documents of the Fund and AEIMCO relating to the transactions in question are located in the Northern District of California, and production of such records at a trial in New York City would necessarily be more burdensome than their production at a trial in San Francisco.

6. In addition to the foregoing considerations, it should be noted that nine individual defendants (Messrs. Merrill, Dennis, Coleman, Dougall, Fulton, Mein, Osborne, Ray and Tharp) are sued in their capacity as directors of the Fund in 1968 at the time of the transactions complained of in this action. All of such defendants who are presently alive are residents of the Northern District of California. In accordance with the applicable provisions of the By-laws of the Fund and of Section 145 of the Delaware Corporation Law, such directors have the right to be indemnified by the Fund against expenses (including attorneys' fees) actually and reasonably incurred by them in connection with the defense or settlement of this action, if they acted in good faith and in a manner they reasonably believed to be in or not opposed to the best interests of the Fund, and are not adjudged

liable for negligence or misconduct in the performance of their duties to the Fund. Accordingly, assuming that no such adjudication is made, the Fund will necessarily bear the expenses which will be incurred by the defendant-directors in traveling to and staying in New York City for the trial, for conferences with New York counsel and for any other purpose related to the action. Similarly, the Fund will bear the added expense flowing from representation of the defendant-directors by New York City (rather than San Francisco) counsel, whose clients will be located 3,000 miles from their attorneys' offices.

WHEREFORE, your deponent respectfully prays that defendants' motion be granted.

Thomas E. Terry

Thomas E. Terry

Sworn to before me this
13 day of June, 1974.

Isabelle V. Lindskoog

Notary Public

I. V. LINDSKOOG
NOTARY PUBLIC – CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires Sept. 23, 1977

Affidavit of Robert N. Kaplan in
Opposition to Motion, Pursuant to
28 U.S.C. §1404(a), to Transfer Action

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONROE KORN,

Plaintiff,

- against -

FRED H. MERRILL, et al.,

Defendants.

74 Civ. 1862 (R.L.C.)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT N. KAPLAN, being duly sworn, deposes and says:

1. I am a member of the firm of KAPLAN, KILSHEIMER & FOLEY, attorneys for plaintiff herein. I make this Affidavit in opposition to defendants' motion pursuant to 28 U.S.C. § 1404(a) to transfer this action to the Northern District of California.

2. Annexed hereto as Exhibits "A" and "B", respectively, are copies of Plaintiff's Interrogatories-Relating To Change of Venue and Defendants' Answers thereto. Defendants' Answers to these interrogatories show that most of the negotiations concerning the subject merger took place in New York, the documents of defendant American Express Company ("Amexco") are located in New York, Amexco's attorneys, accountants and consultants, who participated in the merger negotiations and meetings, are located in New York, and key studies and analyses and the persons who wrote them are in New York.

For these reasons and additional reasons detailed in Plaintiff's Memorandum, it is respectfully submitted that the Court should deny defendants' motion.

Robert N. Kaplan

ROBERT N. KAPLAN

Sworn to before me this
21st day of August, 1974.

Harold Simon

Notary Public

HAROLD SIMON
Notary Public, State of New York
No. 30-9012500
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1976

Affidavit of Monroe Korn in

Opposition to Motion, Pursuant to

28 U.S.C. §1404(a), to Transfer Action

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MONROE KORN,

Plaintiff,

-against-

FRED H. MERRILL, et al.,

Defendants.

----------x

74 Civ. 1862 (RLC)

AFFIDAVIT

MONROE KORN being duly sworn deposes and says:

1. I reside at 32 Graham Road, Scarsdale, New York and am the plaintiff herein. I make this affidavit in opposition to defendants' motion to transfer this suit from the Southern District of New York to the Northern District of California.

2. I own common stock of American Express Investment Fund ("Fund") and have been an owner of such shares or of Commonwealth Investment Company, a predecessor Fund, since 1955. I purchased said shares in 1955 through Harris, Upham & Co. 14 Wall Street, New York, N.Y. In 1955 and at all times since then I have been a resident of New York State.

3. The Complaint herein alleges that certain profits made through the sale in 1968 of Fund's investment advisor should have been paid to Fund rather than to the shareholder's of the investment advisor. I have been informed that under the law as enunciated by the United States Court of Appeals for the Second Circuit, profits attributable to the sale of an advisor's investment advisory position belong to the Fund rather than to the advisor's shareholders. I have also been informed that the law as enunciated by the United States Court of Appeals for the Ninth Circuit is much

less favorable to Fund's claim.

4. Consequently, I believe that I have a much better chance of prevailing in the lawsuit if this suit remains in the Southern District of New York. Since I purchased my shares of Fund in New York and have been a resident of New York at all times since my purchase, I am entitled to the protection afforded me by the laws of this state. It would be unfair, prejudicial , and detrimental to my claim to subject me to the laws of California.

It is respectfully submitted that this Court should deny defendants' motion to transfer this suit to California.

Monroe J Korn

MONROE KORN

Sworn to before me this
21 day of AUGUST, 1974

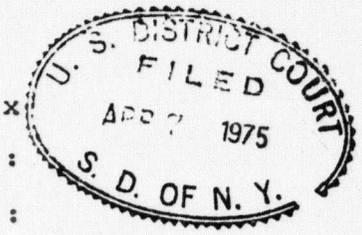
Notary Public

DANIEL KING
Notary Public, State of New York
No. 31-2113115
Qualified in New York County
Commission expires March 30, 1975

Opinion and Order of Honorable Robert L. Carter Denying Motion to Transfer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Copy



MONROE KORN,

Plaintiff,

- against -

74 Civ. 1862

#42205

FRED H. MERRILL, REID W. DENNIS, S. WALTON COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY and RICHARD F. THORP, JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company), FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC.,

Defendants.

A P P E A R A N C E S:

Messrs. Kaplan, Kilsheimer & Foley
122 East 42nd Street
New York, New York 10017
Attorneys for Plaintiff
Monroe Korn

Messrs. Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005
Attorneys for Defendants
American Express Company
American Express Investment Management Company, and
F. A. Liquidating Corporation
(formerly The Fund American Companies)

A P P E A R A N C E S: (Continued)

Messrs. Paul Weiss Rifkind Wharton & Garrison
345 Park Avenue
New York, New York 10022
Attorneys for Defendants
William Wallace Mein, Jr. and
George E. Osborne

Messrs. Simpson Thacher & Bartlett
One Battery Park Plaza
New York, New York 10004
Attorneys for Defendant
American Express Investment Fund, Inc.

CARTER, District Judge

O P I N I O N

Plaintiff has instituted this derivative action on behalf of defendant, American Express Investment Fund (Fund), which prior to April 27, 1970, was the Commonwealth Investment Company. The action is brought for alleged violations of the Investment Company Act of 1940, 15 U.S.C. §80a-1 et seq.; the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq.; the Investment Advisors Act of 1940, 15 U.S.C. §80b-1 et seq.; and the rules and regulations issued pursuant to these statutes.

The pertinent facts gleaned from the complaint and various affidavits of the parties are as follows. The Fund a Delaware corporation with principal offices in California, had net assets as of September 28, 1968, of approximately $192 million and some 27,000 shareholders. We have no figures for a breakdown as to New York and California addresses of Fund shareholders in 1968, but as of September 28, 1973, there were some 7,643 California shareholders holding over seven million outstanding shares of the Fund, and some 2,345 New York shareholders holding one-and-one-half million shares of the Fund.

The Fund American Investment Management Company (FAIMCO), now the American Express Investment Management Company (AEIMCO), in 1968 was a wholly-owned subsidiary of the Fund American Companies (FAC), now known as F. A. Liquidating Corporation. Both FAIMCO and FAC are California corporations with their principal offices in northern California.

FAIMCO acted as investment adviser to the Fund and as its principal underwriter for the continuous public sale of Fund stock. The advisory agreement provided for FAIMCO to render investment advice to the Fund, determine what securities the Fund should buy and sell, provide various management services for the Fund, including executives and other personnel, office space and equipment. For these services, FAIMCO received an annual advisory fee based on 1/2 of 1% of the average daily net assets of the Fund up to 150 million dollars, and 4/10ths of 1% of net assets in excess of that figure.

In 1968, American Express Corporation (American Express), a New York corporation with its principal place of business here in New York, entered into an agreement to acquire control of FAIMCO by acquiring substantially all the assets of FAC. The agreement called for American Express to issue to FAC shareholders

preferred shares of American Express having an aggregate value in 1968 of approximately 415 million dollars. Consummation of the agreement was conditioned on two factors: (1) that the Fund shareholders approve reinstatement of the advisory agreement after American Express takeover--this being required by the Investment Company Act; and (2) that the Fund Board of Directors approve reinstatement of the underwriting agreement.

At the time when these negotiations took place and the merger with American Express was accomplished, defendants Fred H. Merrill, Reid W. Dennis, S. Waldo Coleman, Herbert E. Dougall, Wallace H. Fulton, William Wallace Mein, Jr., George E. Osborne, Philip A. Ray and Richard F. Thorp were directors of the Fund. Dennis (president) and Thorp (vice-president) were officers of the Fund. Merrill, Dennis and Thorp were also directors of FAIMCO, and Dennis (president) and Thorp (vice-president) were officers of that company. Merrill was a director of FAC and he (president) and Thorp (senior vice-president) were officers of FAC.

In August, 1968, the Board approved reinstatement of the underwriting agreement, and authorized sending out a proxy statement with notice of the annual meeting on September 28, 1968 recommending approval of the reinstatement of the advisory agreement. The agreement, which constituted an effective merger into American Express, was thereafter duly effectuated.

Plaintiff contends that FAIMCO and FAC breached their fiduciary relationship to the Fund; that the 415 million dollar value given by American Express for acquisition of FAC was far in excess of the value of any assets FAC possessed; that the excess value given was in effect for the sale to American Express of FAIMCO's fiduciary role as investment adviser and principal underwriter of the Fund in violation of the Investment Company Act; that in failing to disclose the true nature of the transaction the proxy statement was thereby false, misleading and incomplete.

Defendants have moved pursuant to 28 U.S.C. §1404(a) [1] to have the case transferred to the Northern District of California. Pursuant to that provision, the court in its discretion is empowered to order a transfer to another federal district where the case

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[1] 28 U.S.C. §1404(a) provides:

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

might have been brought, where warranted for the convenience of the parties and witnesses and in the interest of justice.

At the threshold of our analysis it is clear that the case might have been brought in the Northern District of California. All the named individual defendants and 34.3% of FAC shareholders (John Doe 1-John Doe 100) reside there. All the corporate defendants, except American Express, have their principal places of business there, and American Express, although a New York corporation, is doing business in the Northern District of California, maintains offices there and is amenable to service of process there.

Therefore, what must be determined is whether in applying relevant criteria in an "individualized, case-by-case consideration of convenience and fairness," Van Dusen v. Barrack, 376 U.S. 612, 622 (1964), the transfer is warranted. In Hoffman v. Blaski, 363 U.S. 335 (1960) (and see United States v. General Motors Corp., 183 F. Supp. 858, 860 (S.D.N.Y. 1960); Schneider v. Sears, 265 F. Supp. 257, 263 (S.D.N.Y. 1967)), the following considerations were cited as consequential in determining whether to grant or deny a §1404(a) motion: (1) convenience to the parties; (2) to the

witnesses; (3) relative ease of access to sources of proof; (4) availability of process to compel attendance of unwilling witnesses; (5) costs of obtaining willing witnesses; (6) where the case can be tried most expeditiously and inexpensively; (7) whether the administration of justice will be advanced by the transfer.

While this is a derivative action and the plaintiff's choice of forum is accorded substantially less significance than would ordinarily be the case, Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 524 (1947); Silverman v. Wellington Management Co., 298 F. Supp. 877 (S.D.N.Y. 1969), the burden is on the defendant to make the case for transfer, Harris v. American Investment Co., 333 F. Supp. 325 (E.D. Pa. 1971); Ruskay v. Reed, 225 F. Supp. 581 (S.D.N.Y. 1963), by a clear showing that the balance of convenience weighs heavily in defendant's favor. Breindel v. Levitt & Sons, Inc., 294 F. Supp. 42 (E.D.N.Y. 1968). The mere shifting of the burden of inconvenience from the defendant to the plaintiff will not suffice, Levin v. Mississippi River Corp., 289 F. Supp. 353 (S.D.N.Y. 1968), and therefore, the mere convenience of the parties cannot be given very substantial consideration in determining whether

litigation ought to be transferred to another district. Dreier v. Tarpon Oil Co., CCH Fed. Sec. L. Rep. ¶92,861 (S.D.N.Y. 1970).

The defendants contend that all the named individual defendants will be witnesses. While this may be true, the materiality of their testimony has not been made clear and it is the materiality of the witnesses' testimony, not the testimony in general of witnesses, which is critical to the issue under consideration. See Solomon v. Continental American Life Ins. Co., 472 F. 2d 1043 (3d Cir. 1973). On the issue of material testimony, it would appear that there are witnesses in New York, as well as in California, who could conceivably contribute much on that score. Negotiations took place in New York and California. Attorneys and accountants who worked on the merger and submitted reports in respect thereto for American Express are located in New York. While it is true that attorneys, accountants and other personnel who worked on the merger and submitted various memoranda and analyses are in California, it must also be remembered that the balance of convenience must be weighted heavily in defendants' favor for them to prevail. See Breindel v. Levitt & Sons, Inc., supra. Moreover, various of these analyses which might be material are located in

New York. Therefore, on the question of material witnesses and documentary evidence, it would not appear that the Northern District of California as the locus for trial would provide easier access to the sources of proof than would be the case if the trial were held in New York.

Plaintiff indicates that he would like to call as witnesses certain individuals from Blyth Eastman and Price Waterhouse & Co. to testify. Since these parties were employed by American Express to provide information for the latter's use in determining whether to go through with the merger and on what terms, it must be assumed that they would be unwilling witnesses for the plaintiff. In any event, plaintiff is not in a position to compel their attendance at trial in California. Although it is probably true that such testimony of these witnesses could be secured by deposition, the court does not feel it is within its perogative to require that plaintiff present this testimony through deposition rather than live at the trial. On the other hand, all witnesses whom defendants appear to require are either under their control or could be made readily accessible whenever the trial takes place.

The calendar congestion in the Northern District is less than here--the time from filing to disposition on the average in a civil case there is 12 months, while the average here is 18. See Management Statistics for United States Courts (1973) pp. 23-96. I do not believe that there is sufficient disparity to warrant moving the case from this district. In sum, I remain unpersuaded that it would be in the interest of justice to move the case to California.

Plaintiff has cited as reasons for keeping the case here that he would benefit by application of the principles enunciated by this circuit in Rosenfeld v. Black, 445 F. 2d 1337 (2d Cir. 1971), whereas the Ninth Circuit's holding in Securities and Exchange Commission v. Insurance Securities, 254 F. 2d 642 (9th Cir. 1958), would be less favorable to plaintiff's cause. Aside from the fact that such a question can play no part in the court's determination, and plaintiff's argument in that regard constitutes "mere forum shopping," Scheinbart v. Certain-Teed Products Corp., 367 F. Supp. 707, 711 (S.D.N.Y. 1973), it should be pointed out that there is no certainty that Rosenfeld will be applicable to this case. Judge Friendly, who authored Rosenfeld,

has pointed out in Newman v. Stein, 464 F. 2d 689, 694-96 (2d Cir. 1972),[2] that there is no certainty that Rosenfeld will remain viable in the light of various legislative efforts to blunt the force of its holding and the distinct possibility that the United States Supreme Court might at some point resolve the conflict between Rosenfeld and Insurance Securities in the latter's favor. Moreover, there is no assurance or certainty that application of Rosenfeld to the facts developed at trial will measure up to plaintiff's expectations.

Defendant's motion to transfer pursuant to 28 U.S.C. §1404(a) is denied.

SO ORDERED.

Dated: New York, New York
April 7, 1975

Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

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[2] Defendants' argument that it will cost the Fund more to defend the case here than in California is discounted. I am not certain that overall costs of litigation will be any greater to the Fund if the case is tried in New York. If plaintiff prevails and is awarded damages, counsel fees and disbursements out of such award would conceivably be lower than if plaintiff had to go to trial in California with New York and California counsel.

Notice of Motion, Pursuant to F.R.Civ.P. 12(c) and 56(b), for Order Granting Judgment on the Pleadings or Summary Judgment in Favor of Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MONROE KORN,	:	
Plaintiff,	:	74 Civ. 1862 (RLC)
-against-	:	NOTICE OF MOTION
FRED H. MERRILL, et al.,	:	
Defendants.	:	

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Fred H. Merrill, duly sworn to on the 22nd day of April, 1975, and upon all the proceedings heretofore had herein, defendants American Express Company, American Express Investment Management Company, FA Liquidating Corp. (formerly The Fund American Companies), William Wallace Mein, Jr. and George Osborne will move before Hon. Robert L. Carter of this Court in Room 705 at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, at 10:00 A.M. on May 9th, 1975 or as soon thereafter as counsel can be heard, for an order, pursuant to Fed. R. Civ. P. 12(c) and 56(b), granting judgment on the pleadings or summary judgment in favor of defendants on the ground that the cause of action purportedly asserted in the complaint

is barred by the statute of limitations; and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York

April 29, 1975

Yours, etc.,

WINTHROP, STIMSON, PUTNAM & ROBERTS

By s/ Stephen A. Weiner
A Member of the Firm
Attorneys for Defendants
American Express Company,
American Express Investment
Management Company, and
FA Liquidating Corp. (formerly
The Fund American Companies)
Office & P. O. Address
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New York, New York 10005
(212) 943-0700

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By s/ Arthur L. Liman
A Member of the Firm
Attorneys for Defendants
William Wallace Mein, Jr. and
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(212) 644-8000

TO: KAPLAN, KILSHEIMER & FOLEY, ESQS.
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) MU 7-1980

Affidavit of Fred H. Merrill in Support of Motion for Judgment on the Pleadings or Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

MONROE KORN, :

Plaintiff, :

v. : 74 Civ. 1862 (RLC)

FRED H. MERRILL, et al., : AFFIDAVIT

Defendants. :

- x

STATE OF CALIFORNIA)
: ss.:
COUNTY OF SAN FRANCISCO)

FRED H. MERRILL, being duly sworn, deposes and says:

1. I am one of the individuals named as a defendant in the above-entitled action, but have not been served with process as of the date hereof. I reside at 2222 Hyde Street, San Francisco, California. While now retired, I was formerly Chairman of the Board, and later Chairman of the Executive Committee, of Fireman's Fund Insurance Company and Fireman's Fund American Life Insurance Companies, wholly-owned subsidiaries of American Express Company ("Amexco"), another of the defendants in this action. Prior to my retirement I was also Chairman of the Executive Committee, and a Director, of Amexco.

2. During 1968, at the time of the transactions complained of in this action, I was Chairman and President of The Fund American Companies ("FAC") (now known as FA Liquidating Corp.), a defendant in this action; Chairman of Fund American Investment Management Company ("FAIMCO") (now known as American

Express Investment Management Company ("AEIMCO")), a defendant in this action; and Chairman of Commonwealth Investment Company ("Fund") (now known as American Express Investment Fund, Inc.), a nominal defendant in this action. I continued to be Chairman of FAIMCO (name later changed to AEIMCO) and of Fund until September 14, 1972, and am currently a Director of AEIMCO and Advisor to the Board of Directors of Fund.

3. I make this affidavit in support of a motion by those defendants served with process herein (other than Fund) for judgment on the pleadings or for summary judgment, on the ground that the claim alleged in the complaint is barred by the applicable statute of limitations.

4. A copy of the complaint in this action is, for the convenience of the Court, annexed to this affidavit as Exhibit A. As set forth therein, the action is a derivative suit purportedly brought on behalf of Fund by the plaintiff Monroe Korn, who alleges that he has been a shareholder of Fund since at least January, 1968. As alleged in the complaint, in 1968 and for some years prior thereto defendant FAIMCO, then a wholly-owned subsidiary of FAC, served as investment advisor to Fund, pursuant to an investment advisory agreement between Fund and FAIMCO. Pursuant to an underwriting agreement between Fund and FAIMCO, in 1968 and for some years prior thereto FAIMCO also acted as principal underwriter for shares of stock of Fund sold to the public on a continuous basis.

5. The complaint relates to the acquisition by a newly formed, wholly-owned subsidiary of Amexco in the fall of 1968 of substantially all the assets of FAC, including all the outstanding shares of stock of FAIMCO, in exchange for shares of preferred stock of Amexco, which shares were then distributed to the stockholders of FAC. The FAIMCO shares were only a small portion of the total assets transferred by FAC, which was engaged through

subsidiaries in the property and casualty insurance, and life insurance, businesses. The complaint attacks the transaction between FAC and Amexco as a sale to Amexco "of FAIMCO's fiduciary position as investment advisor, and its position as principal underwriter of Fund, in violation of the [Investment Company] Act [of 1940]." (Compl. ¶ 16(a))

6. The complaint also refers to the execution of a new underwriting agreement between FAIMCO and Fund, pursuant to approval of the Board of Directors of Fund, and of a new investment advisory agreement between FAIMCO and Fund, pursuant to the approval of the stockholders of Fund at a special meeting of stockholders held on September 24, 1968. Such approvals were required by the provisions of the Investment Company Act of 1940, since the change in controlling ownership of FAIMCO automatically terminated the existing investment advisory and underwriting agreements. The complaint alleges that an unspecified portion of the securities of Amexco received for the assets of FAC "constituted payment for the fiduciary offices and for defendants' inducing Fund stockholders to approve the reinstatement of the advisory agreement between Fund and FAIMCO." (Compl. ¶ 16(b)) It is asserted that defendants breached their fiduciary duties to Fund by causing to be paid to FAC and its stockholders, rather than to Fund, the consideration Amexco "was willing to pay . . . for the privilege of controlling or becoming the advisor and principal underwriter of Fund. . . ." (Compl. ¶ 16(c))

7. The complaint also contends that Fund's proxy statement of August 1968, issued in connection with the special meeting of stockholders of September 24, 1968, was materially false, misleading and incomplete, because, inter alia, it "failed to reveal that Fund and its stockholders were entitled to the profits arising from defendants' sale of their fiduciary offices."

(Compl. ¶ 18(a))

8. Fund, on whose behalf this action has allegedly been brought, at all relevant times has been a Delaware corporation with its principal place of business in California. Fund has no present place of business in New York and has never qualified to transact business in New York. AEIMCO (formerly FAIMCO) at all relevant times has been a California corporation with its principal place of business in California. FA Liquidating Corp. (formerly FAC) at all relevant times has been a California corporation with its principal place of business in California.

10. The transactions which are complained of in this action occurred in the State of California:

(a) The Agreement and Plan of Reorganization dated as of July 22, 1968 between Amexco and FAC, pursuant to which a wholly-owned subsidiary of Amexco acquired the shares of FAIMCO, became a binding agreement upon the parties when executed by myself and Robert P. J. Cooney on behalf of FAC in the offices of FAC in California on September 16, 1968.

(b) The meeting of the Board of Directors of Fund, at which a new underwriting agreement between FAIMCO and Fund was approved, took place in California on June 18, 1968. At this meeting the Board of Directors of Fund also resolved to recommend to the stockholders of Fund that a new investment advisory agreement between Fund and FAIMCO be approved.

(c) The proxy material of Fund for the special meeting of its stockholders held September 24, 1968 was prepared in California, and was mailed from California on or about August 16, 1968. The meeting itself was held in California on September 24, 1968.

(d) The new investment advisory agreement between Fund and FAIMCO and the new underwriting agreement between Fund and FAIMCO were executed in California on October 31, 1968.

(e) The closing between Amexco and FAC, pursuant to which substantially all the assets of FAC, including the outstanding shares of FAIMCO, were transferred by FAC to a newly formed subsidiary of Amexco in exchange for the securities of Amexco, took place in California on October 31, 1968.

11. The facts upon which this action is predicated have been public knowledge since 1968. Annexed hereto as Exhibit B is a copy of the proxy statement of Fund dated August 16, 1968, and relating to the proposed approval of a new investment advisory agreement between FAIMCO and Fund. Annexed hereto as Exhibit C is a copy of the proxy statement of FAC dated September 3, 1968, and relating to the proposed acquisition by an Amexco subsidiary of substantially all the assets of FAC. A substantially identical proxy statement was sent by Amexco to its own stockholders. It is clear from the face of the complaint that the factual allegations contained therein are based upon the contents of these proxy statements.

Fred H. Merrill

Sworn to before me this
22nd day of April, 1975.

Louise M. Pescetta
Notary Public

LOUISE M. PESCETTA
...FORNIA
...NCISCO
My Commission Expires Feb. 6, 1976

Exhibit B to Affidavit of Fred H. Merrill:

Commonwealth Investment Company
Notice of Special Meeting of Stock-
holders to be Held September 24, 1968

Proxy Statement

COMMONWEALTH INVESTMENT COMPANY
P.O. Box 7650
San Francisco, California 94119

ESTABLISHED 1932

Notice of Special Meeting of Stockholders to Be Held September 24, 1968

To the Stockholders of Commonwealth Investment Company:

A special meeting of the stockholders of Commonwealth Investment Company will be held at the offices of The Fund American Companies, 3333 California Street, San Francisco, California, on Tuesday, September 24, 1968, at 10:00 a.m. The meeting will be held for the following purposes:

(1) The approval or disapproval of an agreement with Fund American Investment Management Company, a wholly-owned subsidiary of The Fund American Companies, for investment advisory and other services in substantially identical form to the present agreement, such new agreement being required by reason of a proposed reorganization in which Fund American Investment Management Company would become a wholly-owned subsidiary of the American Express Company, as described in the Proxy Statement accompanying this notice;

(2) To transact such other business as may properly come before the meeting or any adjournment or adjournments thereof.

All stockholders of record at the close of business on August 8, 1968, are entitled to notice of and to vote at this meeting or any adjournment thereof. The enclosed proxy provides the means for all to vote.

If you do not expect to attend the meeting in person, please fill in, date, sign, and mail the enclosed proxy in the enclosed postage prepaid envelope so that your shares may be voted at the meeting.

Thomas E. Terry, *Secretary*

San Francisco, California
August 16, 1968

PROXY STATEMENT

This statement is furnished in connection with the solicitation of proxies by the management of Commonwealth Investment Company (Company), to be used at the special meeting of stockholders, which will be held at the offices of The Fund American Companies, 3333 California Street, San Francisco, California, on Tuesday, September 24, 1968, at 10:00 a.m., for the purposes set forth in the accompanying Notice of Special Meeting of Stockholders. Stockholders who execute proxies retain the right to revoke them at any time before they are voted. The proxy solicitation expenses, namely, the cost of printing and postage, will be paid by the Fund American Investment Management Company (FAIMCO).

Exhibit B

Each full share of stock outstanding is entitled to one (1) vote. As of June 30, 1968 the Stock Transfer Agent advises that there were 17,736,437 shares of the Company's capital stock outstanding. All shares have equal voting rights.

The Investment Company Act of 1940 provides that there can be no change in the controlling ownership of the management company with which an advisory agreement is in effect without the knowledge and consent of the shareholders of the investment company. This is accomplished by a provision that any such change automatically terminates such advisory agreement. Thus, when such transfer of ownership is otherwise agreed to, it is usually conditioned on shareholder approval of the agreement.

This assignment is being occasioned by a transfer of substantially all the assets of The Fund American Companies (Fund American), including the stock of its subsidiary FAIMCO, to a wholly-owned subsidiary of American Express Company (American Express). This transaction will involve a transfer of Fund American stockholders' equity which on June 30, 1968 approximated $415,000,000 at market value, of which approximately $1,888,000 represents FAIMCO's stockholder's equity. Approval of the new investment advisory contract by the shareholders of the Company will not result in the receipt of any direct benefits to such shareholders.

This meeting has been called to consider and act on a new investment advisory agreement (Agreement) with FAIMCO which is in substantially identical form to the present agreement.

1. Approval of Investment Advisory Agreement.

The existing Investment Advisory Agreement with FAIMCO, P.O. Box 7650, San Francisco was entered into on January 4, 1966 and was last approved by the stockholders of the Company at the annual meeting held on April 18, 1968.

(a) Termination of Present Contracts with Investment Adviser and Underwriter.

An Agreement and plan of reorganization has been adopted by the respective boards of directors of Fund American and American Express. This plan of reorganization provides for the transfer of substantially all of the assets of Fund American to a wholly-owned subsidiary of American Express in exchange for preferred shares of American Express. Upon consummation of the acquisition, the assets and business of Fund American will be held and operated by a wholly-owned subsidiary of American Express. Before the combination can be effected, the proposal must be approved by the affirmative vote of the holders of a majority of the outstanding capital stock of Fund American and by the affirmative vote of the holders of a majority of the outstanding common shares of American Express.

Since FAIMCO is a wholly-owned subsidiary of Fund American, the reorganization will result in a change of control of FAIMCO which under the Investment Company Act of 1940 will result in the automatic termination of the present Investment Advisory and Underwriting Agreements between the Company and FAIMCO. A new investment advisory agreement may be executed upon the approval of the holders of the majority of the outstanding shares of capital stock of the Company, and a new underwriting agreement may be executed upon the approval of the Board of Directors of the Company. The Board of Directors of the Company has approved a new Underwriting Agreement to become effective upon the date the existing Underwriting Agreement terminates by reason of the acquisition and has recommended stockholder approval of

a new Investment Advisory Agreement. The proposed acquisition is conditioned upon the approval of the new Investment Advisory and Underwriting Agreements between FAIMCO and the Company, and between FAIMCO and Commonwealth Stock Fund, Inc., Commonwealth Income Fund, Inc. and Commonwealth Capital Fund, Inc. respectively. If the Agreement with FAIMCO is not approved by the shareholders, the existing contract will continue in effect in accordance with its terms.

The Board of Directors did not negotiate directly with any prospective investment advisory firm. The decision of the Board of Directors to recommend approval of the Agreement with FAIMCO was based principally on the satisfactory nature of the services performed for the Company by FAIMCO under the present and preceding investment advisory agreements dating back to 1932 and upon advice to the effect that American Express planned to make no changes in personnel, management policies or operations of FAIMCO.

There is given below a summary of the terms of the Agreement which will be presented in its entirety at the meeting. To become effective, a majority of the outstanding voting securities must approve the Agreement. The management recommends the approval of the Agreement. It is intended that proxies not voted or limited to the contrary will be voted for the approval of the execution of the Agreement.

(b) Investment Advisory Agreement.

FAIMCO serves as manager of the investment portfolio of the Company, furnishing investment advisory, research, and statistical services and consulting with the Company as to its security holdings and changes in such holdings. For these services, FAIMCO receives an annual fee of ½ of 1% of the Company's net assets, computed daily; on assets of the Company in excess of $150,000,000 the fee is 4/10 of 1%. On June 30, 1968 the Company had net assets of $191,948,516. Pursuant to the present agreement between the Company and FAIMCO, FAIMCO received a management fee of $896,482 during the last fiscal year. The Company also paid FAIMCO $88,242 in stock transfer and dividend disbursement fees during the year.

In accordance with the Investment Company Act of 1940 the Agreement provides for immediate termination upon assignment by FAIMCO, and may be terminated, without the payment of any penalty, by the Board of Directors of the Company or by vote of a majority of the outstanding capital stock of the Company on thirty days written notice or by FAIMCO on similar notice to the Company. Unless terminated, the Agreement will be operative from year to year if it is specifically approved at least annually either by the Board of Directors of the Company (including a majority of the Directors who are not parties to such contract or agreement or affiliated persons of any such party) or by a vote of a majority of the outstanding capital stock of the Company.

(c) Information About the Investment Adviser and Underwriter.

The FAIMCO organization has acted as both the investment adviser and principal underwriter of the Company since the Company began operations in 1932. Moreover, the organization has managed investment company funds since 1925. FAIMCO also acts as investment adviser and principal underwriter for Commonwealth Stock Fund, Commonwealth Income Fund, and Commonwealth Capital Fund, which on June 30, 1968 had net assets of $56,036,737, $94,821,666, and $115,121,511 respectively. Pursuant to investment advisory agreements with each of these

companies, FAIMCO receives an annual management fee of ½ of 1% of the funds' net assets computed daily.

As principal underwriter of the Company, FAIMCO retained $59,256 in gross revenue from commissions before the payment of expenses during the last fiscal year of the Company. This amount represents the proportion of the commissions paid by investors purchasing shares of the Company which FAIMCO retained after allowing $200,910 to the investment dealers who sold the shares. These amounts do not represent an expense to the Company.

(d) Portfolio Brokerage.

During the fiscal year 1967 the Company paid total brokerage commissions of $411,859 of an aggregate of $1,995,980 in brokerage commissions paid by all of the investment companies in the Commonwealth Group. Such brokerage commissions are allocated to non-affiliated broker dealers who sell shares of the Company and of the other Commonwealth Funds and to those who furnish security analysis studies, statistical and investment information and other services at no additional cost to the investment adviser. FAIMCO in making such allocations considers all the investment companies in the Commonwealth Group collectively. No formula, general or specific, is used in making such allocations, except commissions are allocated as nearly as possible on a pro-rata basis to broker dealers who sell the funds' shares. During 1967, approximately 70% of the brokerage commissions paid by all of the Commonwealth Funds was allocated to the firms which sold shares of the funds and approximately 30% was allocated to firms furnishing research and other services. Those percentages vary from year to year and will not necessarily be the same in the future. Some firms which sold shares of the funds also provided investment services to the investment adviser. In selecting the broker to be used in the purchase and sale of the funds' portfolio securities, primary consideration is given by FAIMCO to the broker's ability to execute transactions at prices most favorable to the funds. The investment adviser is able to fulfill its obligation to furnish a continuous investment program to the Company without the research and investment information furnished by broker dealers. However, the investment adviser considers access to such information as an important part of financial management; such information is useful but of indeterminable value.

(e) Pending Litigation.

A shareholder's derivative suit has been filed in Chancery Court for Newcastle County in Wilmington, Delaware, by Edward Leidman as custodian for Adele Leidman, a shareholder of the Company. The Fund American Companies, FAIMCO, Commonwealth Investment Company and each of the Directors of Commonwealth Investment Company are all named as defendants of this lawsuit. The complainant alleges that the practice of directing brokers handling portfolio transactions to give up portions of their commissions to other brokers is unlawful. The lawsuit also attacks other business practices of FAIMCO claiming that commissions generated by Company purchases and sale of stock go to the brokers that provide certain services which are allegedly for the improper benefit of the defendants. The plaintiff seeks rescission of the contracts between FAIMCO and the Company and a return to the Company of all monies received under the contracts during the period of the alleged violation. Over the course of the last year and a half a number of similar lawsuits have been brought against the investment advisers of other mutual funds in various courts in the United States. In the opinion of the Company's officers and directors and of its counsel the action is without merit. In the event that the plaintiff prevails, any recovery, except for fees awarded to plaintiff's attorneys, will inure to the benefit of Commonwealth Investment Company.

(f) Management of Investment Adviser and Underwriter.

The names, addresses, and the principal occupations of the Directors of FAIMCO are as follows:

Names	Principal Occupations
Fred H. Merrill	Chairman and President, The Fund American Companies; Chairman of FAIMCO, Commonwealth Investment Company, Commonwealth Stock Fund, Commonwealth Income Fund, and Commonwealth Capital Fund.
Reid W. Dennis	Director and President, FAIMCO, Commonwealth Investment Company, Commonwealth Stock Fund, Commonwealth Income Fund, and Commonwealth Capital Fund.
Lewis V. Coleman	Director and Senior Vice President, FAIMCO; Senior Vice President, Commonwealth Investment Company, Commonwealth Stock Fund, Commonwealth Income Fund, and Commonwealth Capital Fund.
Richard F. Tharp	Senior Vice President, The Fund American Companies; Director and Vice President, FAIMCO, Commonwealth Investment Company, Commonwealth Stock Fund, Commonwealth Income Fund, and Commonwealth Capital Fund.
Robert P. J. Cooney	Secretary, Senior Vice President and General Counsel, The Fund American Companies.
Bartlett T. Grimes	Vice President and Treasurer, The Fund American Companies.
Harry A. Olson, Jr.	Vice President, The Fund American Companies.

The business address of Fred H. Merrill, Robert P. J. Cooney, Bartlett T. Grimes, Harry A. Olson, Jr., and Richard F. Tharp is 3333 California Street, San Francisco, California. The business address of Reid W. Dennis and Lewis V. Coleman is P.O. Box 7650, San Francisco, California.

The balance sheets of FAIMCO reflecting its financial position as of December 31, 1967, and June 30, 1968 appear at page 7.

2. Other Matters.

As of the date of this statement, the management knows of no other business that will come before the meeting. Should other business come before the meeting, it is intended that the proxies in the accompanying form will be voted thereon in accordance with the judgment of the person or persons voting such proxies.

The annual report for the year ending December 31, 1967 including financial statements has been mailed to the stockholders; a semi-annual report including financial statements as of June 30, 1968 was also mailed to stockholders. These reports are not to be regarded as proxy soliciting material or as part of this proxy statement.

REPORT OF CERTIFIED PUBLIC ACCOUNTANTS

FUND AMERICAN INVESTMENT MANAGEMENT COMPANY:

We have examined the balance sheet of Fund American Investment Management Company, a wholly-owned subsidiary of The Fund American Companies, at December 31, 1967. Our examination was made in accordance with generally accepted auditing standards, and accordingly included a review of the procedures followed for safeguarding the securities of customers and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying balance sheet presents fairly the financial position of Fund American Investment Management Company at December 31, 1967, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

JOHN F. FORBES & COMPANY
Certified Public Accountants

San Francisco, California
January 17, 1968 except for Note 4, as of May 16, 1968

FUND AMERICAN INVESTMENT MANAGEMENT COMPANY

(Wholly-Owned Subsidiary of The Fund American Companies)

BALANCE SHEETS

ASSETS	December 31, 1967	June 30, 1968 (Unaudited)
CURRENT ASSETS:		
Cash	$ 155,758	$ 77,780
Marketable securities, at cost (market value, $1,280,678 and $2,031,160, respectively)	1,380,576	1,760,617
Accounts receivable	195,891	347,773
Receivable from dealers for shares sold	2,172,086	3,678,908
Receivable from Funds for shares repurchased	741,803	631,602
Dividends and interest receivable	12,441	16,420
Prepaid insurance and expenses	4,684	6,203
Total current assets	4,663,239	6,519,303
FURNITURE, EQUIPMENT, AND LEASEHOLD IMPROVEMENTS: (at cost, less accumulated depreciation and amortization of $56,861 and $66,161, respectively)	76,531	73,800
	$4,739,770	$6,593,103

LIABILITIES AND STOCKHOLDER'S EQUITY

CURRENT LIABILITIES:		
Accounts payable	$ 117,017	$ 114,603
Accrued taxes:		
Federal income tax	108,185	306,185
Other	29,799	16,487
Payable to Funds for shares sold to dealers	2,142,400	3,635,603
Payable to dealers and others for shares repurchased	741,803	631,602
Total current liabilities	3,139,204	4,704,480
STOCKHOLDER'S EQUITY:		
Common capital stock (authorized, 1,000 shares of a par value of $100 each; issued and outstanding, 250 shares)	25,000	25,000
Paid-in surplus	151,802	151,802
Retained earnings	1,423,764	1,711,821
Total stockholder's equity	1,600,566	1,888,623
	$4,739,770	$6,593,103

NOTES:

1. The taxable income of the Company will be included in the consolidated Federal tax return of its parent. The Federal income tax liability represents the unpaid balance of the tax computed on a separate return basis.
2. The Company is lessee under a lease expiring in 1975 at an annual rental of $87,000 plus a percentage of the increase in building operating expenses over the 1966 base year.
3. The Company's retirement plans were completely funded at December 31, 1967.
4. See comments on page 4 of this Proxy Statement with respect to pending litigation.

FUND AMERICAN INVESTMENT MANAGEMENT COMPANY

INCOME AND EXPENSE OF MANAGEMENT AND DISTRIBUTION SERVICES (UNAUDITED)

Fund American Investment Management Company acts as both investment adviser and underwriter of Commonwealth Investment Company, Commonwealth Stock Fund, Inc., Commonwealth Income Fund, Inc., and Commonwealth Capital Fund, Inc. In its accounting records, the Company does not allocate expenses between the two functions. However, this analysis has been prepared for inclusion in this Proxy Statement in order to reflect, as far as possible, the separate income or loss from management and distribution services. The expense figures in this analysis reflect, to a large extent, an estimated allocation solely for purposes of this presentation.

	1965	1966	1967	Six Months Ended June 30, 1968
Management Services:				
Management and other service fees (gross)	$1,520,514	$1,568,771	$1,869,282	$1,102,771
Expenses (including state taxes)	848,034	833,603	1,040,204	590,535
Net management income before provision for Federal income tax	672,480	735,168	829,078	512,236
Provision for Federal income tax	307,010	335,706	417,303	270,090
Net management income after provision for Federal income tax	$ 365,470	$ 399,462	$ 411,775	$ 242,146
Ratio to Gross Management and Other Service Fees:				
Net management income before provision for Federal income tax	44%	47%	44%	46%
Net management income after provision for Federal income tax	24%	25%	22%	22%
Distribution Services:				
Underwriting discounts and commissions on sales (gross)	$1,927,419	$2,121,324	$4,417,674	$3,011,059
Commissions allowed to dealers	1,496,646	1,685,235	3,549,351	2,380,804
Net commissions retained on sales after allowances to dealers	430,773	436,089	868,323	630,255
Expenses (including state taxes)	645,237	709,251	975,772	570,460
Net distribution income (loss) before provision for Federal income tax	(214,464)	(273,162)	(107,449)	59,795
Federal income tax (reduction) expense	(97,910)	(124,736)	(54,083)	31,528
Net distribution income (loss) after provision for Federal income tax	$ (116,554)	$ (148,426)	$ (53,366)	$ 28,267
Ratio to Net Commissions Retained on Sales After Allowances to Dealers:				
Net distribution income (loss) before provision for Federal income tax	(50)%	(63)%	(12)%	9%
Net distribution income (loss) after provision for Federal income tax	(27)%	(34)%	(6)%	4%

Exhibit C to Affidavit of Fred H. Merrill:

Letter to Shareholders of The Fund American Companies dated September 3, 1968

The Fund American Companies Notice of Special Meeting of Shareholders dated September 27, 1968

Proxy Statement

THE FUND AMERICAN COMPANIES
3333 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94120

September 3, 1968

To the Shareholders of The Fund American Companies:

After negotiations covering a period of several months, the Board of Directors, on June 21, 1968, approved a proposal whereby The Fund American Companies and American Express Company would be combined. The proposal was approved by the Board of Directors of American Express Company on June 24, 1968.

As publicly announced, the transaction would involve a tax-free exchange of convertible preferred shares of American Express for the outstanding shares of Fund American. Holders of Fund American common shares will be entitled to receive, for each share, 7/10 of one American Express preferred share, Series $2.30, convertible, share-for-share, into American Express common shares. During a period of approximately 60 days after the closing of the transaction, each Series $2.30 preferred share will be exchangeable for one and one-seventh Series $1.50 preferred shares of American Express, also convertible, share-for-share, into American Express common shares. This will afford those who desire more American Express common shares an opportunity to obtain a higher exchange rate while accepting a lower dividend rate.

Both the Series $2.30 preferred and the Series $1.50 preferred will be convertible into American Express common shares for an unlimited period, will be noncallable for five years, will be redeemable at a redemption price of $60 per share after the expiration of the five-year period and have a preference in voluntary liquidation of $60 per share and in involuntary liquidation of $50 and $45 per share, respectively. Unless they wish to receive the liquidation value of $28 per share (plus accrued dividends) in cash, preferred shareholders of Fund American must, if the proposed transaction is approved by the shareholders of Fund American, convert their shares so that they will receive American Express shares on the same basis as if they had originally held the Fund American common shares into which their Fund American preferred shares are convertible. In order to make this choice, it will not be necessary for Fund American preferred shareholders to convert their preferred shares into Fund American common shares prior to the closing of the transaction. At least 30 days' notice of the time to make this choice will be given to the Fund American preferred shareholders.

The proposal also contemplates that six members of the Board of Fund American will become members of the Board of American Express. Howard L. Clark, now President and chief executive officer of American Express, will be Chairman of the Board and chief executive officer; William H. Morton, now Vice Chairman of the Board of American Express, will be President; and I will be Chairman of the Executive Committee of American Express.

It is planned that all the present subsidiaries of Fund American will be held by a newly-formed company wholly-owned by American Express so that the insurance and other operations of Fund American's subsidiaries will continue to be operated separately and substantially autonomously.

American Express, as you know, is a leading international travel and financial company providing the well-known Travelers Cheque and credit card services. Its principal subsidiaries include American Express International Banking Corporation, Uni-Serv Corporation and Equitable Securities, Morton & Co. Incorporated.

Your Board of Directors believes that since both American Express and Fund American, and their respective subsidiaries, are engaged in furnishing financial services, their respective businesses will complement each other when the companies are combined. Details of this very important transaction are contained in the accompanying proxy statement.

The entire Board of Directors joins with me in recommending that you vote in favor of the proposal as described in the proxy statement and, accordingly, that you promptly sign, date and return the enclosed proxy marked with your favorable vote.

Sincerely yours,

Fred H Merrill

Chairman of the Board and President

Exhibit C

THE FUND AMERICAN COMPANIES

NOTICE OF SPECIAL MEETING OF SHAREHOLDERS

September 27, 1968

To the Shareholders of
THE FUND AMERICAN COMPANIES:

A special meeting of shareholders of The Fund American Companies will be held at the office of the Company, 3333 California Street, San Francisco, California, on Friday, September 27, 1968 at 10:30 A.M., for the purpose of considering and taking action on the following proposal, which is approved and recommended by the Board of Directors of the Company:

> To approve (a) the transfer of substantially all the assets and business of the Company to a wholly-owned subsidiary of American Express Company solely in exchange for Series $2.30 preferred shares, $1.66⅔ par value, of American Express Company, at the rate of 7/10 of one such share for each common share of the Company outstanding at the close of business on the day preceding the closing date, with the number of common shares of the Company issuable upon conversion of the preferred shares of the Company deemed to be then outstanding for that purpose, and the assumption by said subsidiary of certain of the debts and liabilities of the Company; and (b) the winding up of the affairs of the Company and the voluntary dissolution thereof, including an amendment of the Articles of Incorporation of the Company changing its name to "FA Liquidating Corp.";

all as set forth in the accompanying Proxy Statement, and to transact such other business as may properly be brought before the meeting or any adjournment thereof.

Only shareholders of record at the close of business on August 16, 1968 will be entitled to vote at the meeting or any adjournment thereof.

By Order of the Board of Directors:

ROBERT P. J. COONEY
Secretary

San Francisco, California
September 3, 1968

PLEASE PROMPTLY SIGN, DATE AND RETURN THE ENCLOSED PROXY WHETHER OR NOT YOU PLAN TO ATTEND THE MEETING.

THE FUND AMERICAN COMPANIES

PROXY STATEMENT

SPECIAL MEETING OF SHAREHOLDERS
to be held September 27, 1968

PURPOSE OF THE MEETING

This proxy statement is furnished in connection with the solicitation of proxies by the management of The Fund American Companies ("Fund American") for use at a special meeting of shareholders of Fund American to be held on September 27, 1968, and any adjournments thereof.

At the special meeting the shareholders will consider and vote upon the proposal set forth in the foregoing Notice of Special Meeting. Each preferred share and each common share outstanding on the record date for the special meeting is entitled to one vote, and the holders of all such common and preferred shares will vote as a single class at the meeting. The affirmative vote of the holders of a majority of the voting power of Fund American is required for the adoption of the proposal. On July 22, 1968 there were 11,253,622 common shares and 184,978 preferred shares outstanding and entitled to vote.

PROXY SOLICITATION

Proxies in the form enclosed are solicited by the management of Fund American at the direction of the Board of Directors. A proxy may be revoked at any time prior to its use by filing a written revocation or a duly executed proxy bearing a later date with the Secretary of Fund American. If a proxy is properly executed and returned in time, the shares represented thereby will be voted in accordance with the instructions specified thereon, or if no contrary instructions are specified, the shares will be voted in favor of the proposal that Fund American shall transfer substantially all its assets to a wholly-owned subsidiary of American Express Company ("American Express") and dissolve.

Information in this proxy statement relating to the assets and business of American Express and its subsidiaries, including their financial statements, has been furnished to Fund American by American Express.

As of the date of this proxy statement, the management does not know of any matters which may come before the special meeting other than those matters which are referred to in this proxy statement. If any other matters properly come before such meeting or any adjournments thereof, the persons named as proxies will vote the shares represented thereby in accordance with their best judgment on such matters.

The cost of soliciting proxies will be borne by Fund American. Proxies may be solicited by officers, directors and regular employees of Fund American personally or by mail, telephone or telegraph, and Fund American may reimburse brokers and other persons for their reasonable expenses in sending soliciting material to their principals.

AMENDMENTS OF CERTIFICATE OF INCORPORATION OF AMERICAN EXPRESS

The Board of Directors of American Express proposes and recommends that its shareholders approve amendments of its Certificate of Incorporation to increase the authorized common shares of American Express to 30,000,000 shares (increased from 20,000,000) of the par value of $1.66⅔ each and to authorize a new class of 20,000,000 preferred shares of the par value of $1.66⅔ each, to be issuable by the Board of Directors in one or more series. The text of the proposed amendments, in substantially the form in which they will be submitted to the shareholders for action at the special meeting, is set forth in full in Exhibit A of Appendix I to this proxy statement.

Of the 20,000,000 preferred shares to be authorized by the amendment, and using figures as of July 22, 1968, up to 7,963,858 preferred shares having an annual dividend rate of $2.30 per share (the "Series $2.30") will be necessary to enable a wholly-owned subsidiary of American Express to acquire the assets and business of Fund American. In addition either 128,147 Series $2.30 preferred shares or 146,454 preferred shares having an annual dividend rate of $1.50 per share (the "Series $1.50"), depending upon receipt of the tax ruling which has been requested from the Internal Revenue Service, will be subject to employee options in substitution for outstanding stock options heretofore granted by Fund American to employees of Fund American and its subsidiaries. (The Internal Revenue Service has been asked to rule that substitution of options covering Series $1.50 preferred shares will not constitute a modification of the Fund American stock options under Section 425(h) of the Internal Revenue Code.) The Series $2.30 preferred shares which will be used to acquire the assets and business of Fund American will be convertible for a short period of time into shares of the Series $1.50 on the basis of one and one-seventh shares of the Series $1.50 for each share of the Series $2.30, and shares of both series will be convertible on a share-for-share basis into common shares of American Express. Accordingly, upon the effective date of the acquisition up to approximately 9,248,011 common shares will be reserved for the conversion of the new preferred shares, including the conversion of preferred shares covered by the employee stock options mentioned above.

Except as stated in the preceding paragraph and except for common shares which may be issued upon exercise of employee stock options, American Express has no plans for the issuance of any additional preferred or common shares to be authorized under the amended certificate of incorporation. Under the law of New York the Board of Directors may issue authorized but unissued and unreserved shares on such terms and conditions as it may decide without further approval of the shareholders.

ACQUISITION OF ASSETS OF FUND AMERICAN

The Agreement and Plan of Reorganization (Appendix I to this proxy statement) dated as of July 22, 1968 (the "acquisition agreement") which has been adopted by the respective Boards of Directors of American Express and Fund American provides for (a) the exchange of preferred shares, Series $2.30, of American Express for substantially all the assets and business of Fund American to be transferred to a wholly-owned subsidiary of American Express and (b) the assumption by such subsidiary of certain of the liabilities and obligations of Fund American and the assumption by American Express of Fund American's obligations under outstanding employee stock options for common shares of Fund American. Unless the parties agree on an earlier date, it is expected that the acquisition will be effective in early December, 1968. However, if the tax rulings referred to below have not been obtained by then, the acquisition will not be effective until such rulings are obtained, but in no event later than March 31, 1969, unless such date is extended by mutual agreement of the parties (Section 3.A of the acquisition agreement).

The terms of the acquisition were arrived at upon arm's-length negotiations between the managements of both companies after consideration of many comparative factors, including earnings, assets, business characteristics and the future prospects of each company, the market prices and book values of the shares of each company and the dividend rates, liquidation preferences, conversion and other features of the American Express preferred shares to be issued.

Upon consummation of the acquisition, the assets and business of Fund American will be held and operated by a wholly-owned subsidiary of American Express. It is anticipated that Messrs. David R. Calhoun, John B. Clark, Robert C. Cowan, James F. Crafts, Ernest J. Loebbecke and Fred H. Merrill will become directors of American Express. Following the acquisition it is also anticipated that Mr. Howard L. Clark, President of American Express, will become Chairman of the Board and chief executive officer of American Express and Mr. William H. Morton, now Vice Chairman of the Board of American Express, will become its President. Mr. Fred H. Merrill, who has been Chairman of the Board and President of Fund American, will become Chairman of the Executive Committee of American Express. Mr. Merrill and the other officers of Fund American are expected to continue with the Fund American group of companies at approximately their present salaries.

Under the terms of the acquisition agreement, holders of Fund American shares will be entitled to receive American Express preferred shares, Series $2.30, on the basis of seven-tenths of one American Express preferred share, Series $2.30, for each Fund American common share, and seven-fifteenths of one American Express preferred share, Series $2.30, for each Fund American preferred share outstanding at the close of business on the last business day preceding the closing date. However, under Article FIFTH of the Articles of Incorporation of Fund American, in order for the holders of Fund American preferred shares to receive American Express preferred shares, such holders will have to exercise their conversion rights or otherwise they will be entitled to receive only their cash liquidation preference of $28 per share plus accrued dividends. Since each Fund American preferred share is convertible into two-thirds of a common share of Fund American (which will be exchangeable for seven-tenths of one preferred share of American Express, Series $2.30), the holder of each Fund American preferred share will, by electing to convert, be entitled to receive seven-fifteenths of one such preferred share of American Express. Also under the terms of the acquisition agreement, options for American Express preferred shares will be substituted for Fund American employee stock options on the basis of seven-tenths of one American Express preferred share, Series $2.30, or eight-tenths of one American Express preferred share, Series $1.50, for each Fund American common share subject to option, depending on whether a favorable tax ruling can be obtained as to the Series $1.50 shares (see SUBSTITUTION OF STOCK OPTIONS below).

Accordingly, the number of preferred shares, Series $2.30, to be issued by American Express to Fund American at the closing will be computed by multiplying the number of common shares of Fund American issued and outstanding at the close of business on the last business day preceding the closing date by seven-tenths (7/10ths), and by multiplying the number of preferred shares of Fund American issued and outstanding on the same date by seven-fifteenths (7/15ths). Also at the closing the number of preferred shares to be subject to options by American Express in substitution for Fund American employee stock options will be computed by multiplying the number of Fund American common shares subject to options by seven-tenths (7/10ths) if Series $2.30 shares are substituted or by eight-tenths (8/10ths) if Series $1.50 shares are substituted (see "Market Prices" under COMPARATIVE PER SHARE DATA, below, for information concerning the over-the-counter market prices of the shares of American Express and Fund American).

At July 22, 1968 (the date of the acquisition agreement) Fund American had issued and outstanding 11,253,622 common shares, $1.25 par value, and 184,978 preferred shares, $25 par value, consisting of 53,682 shares of 6% Cumulative Convertible Preferred Stock and 131,296 shares of 4% Cumulative Convertible Preferred Stock. At the same date 183,067 common shares of Fund American were reserved for outstanding employee stock options. Accordingly, if the transaction had closed on July 22, 1968, 7,963,858 preferred shares of American Express, Series $2.30, would have been issuable in exchange for the assets and business of Fund American, and an additional 128,147 preferred shares, Series $2.30, or 146,454 preferred shares, Series $1.50, would have been subject to options in substitution for outstanding employee stock options of Fund American.

If a Fund American preferred shareholder does not elect to exercise his conversion rights, he will be entitled to receive his liquidation preference of $28 per share (plus any accrued dividends) in cash when Fund American is liquidated. Holders of record of Fund American preferred shares will receive at least 30 days notice of the record date as of which holders of record of Fund American common shares will be entitled to receive in exchange for their common shares the preferred shares, Series $2.30, of American Express, and of the time within which the preferred shareholders may elect to receive their liquidation preference of $28 per share (plus any accrued dividends) in cash instead of exercising their conversion rights.

Holders of American Express preferred shares, Series $2.30, will have the right for approximately 60 days following the closing of the acquisition to convert all or any of such shares into shares of the Series $1.50 on the basis of one and one-seventh fully paid and non-assessable shares of the Series $1.50 for each share of Series $2.30 so converted. If all Fund American preferred shares are converted into the Series $2.30 and if all shares of such series are converted into the Series $1.50 following the

closing of the acquisition, up to a total of approximately 9,248,011 shares of the latter series would be outstanding immediately after such conversion, including 146,454 preferred shares, Series $1.50, which may be substituted for outstanding Fund American employee stock options. The Series $1.50 preferred shares are not convertible into Series $2.30 preferred shares. As noted, both series of preferred shares of American Express will be convertible into fully paid and non-assessable common shares of American Express on a share-for-share basis.

It is contemplated that immediately after the filing of the amendments of the Certificate of Incorporation of American Express upon authorization by its shareholders (a copy of which is annexed as Exhibit A of Appendix I hereto), a further amendment adopted by the Board of Directors of American Express (a copy of which is annexed as Exhibit B of Appendix I hereto) setting forth the terms of the Series $2.30 and the Series $1.50 preferred shares will be filed in the office of the Secretary of State of New York. For a further description of the preferred shares, see DESCRIPTION OF AMERICAN EXPRESS SHARES below.

Upon consummation of the acquisition and the transfer of the assets and business of Fund American to a wholly-owned subsidiary of American Express, Fund American must under the acquisition agreement change its corporate name, liquidate and dissolve and commence the distribution of the preferred shares of American Express to its shareholders (Section 10.D of the acquisition agreement).

Conditions and Termination

Consummation of the acquisition is subject to the fulfillment of certain conditions, including among others (i) the approval by the holders of at least a majority of the outstanding voting capital stock of each company of the proposals before them, (ii) the receipt of favorable federal income tax rulings, (iii) the requirement that certain representations and warranties made by each party to the other are true and correct, and (iv) that certain other actions have been taken and documents received (Sections 8 and 9 of the acquisition agreement). The acquisition agreement may be terminated and cancelled either before or after the shareholders' meetings by mutual consent of the Boards of Directors of both companies or by the Board of Directors of either American Express or Fund American if a condition to its obligation under the acquisition agreement is not satisfied (Section 10.A of the acquisition agreement).

Federal Tax Consequences

American Express and Fund American have been advised by their respective counsel (Messrs. Carter, Ledyard & Milburn and Messrs. Orrick, Herrington, Rowley & Sutcliffe) that for federal income tax purposes the transaction will not result in taxable gain or deductible loss to either corporation or to its shareholders, except for the gain or loss realized by Fund American shareholders upon the sale of any fractional interests they may receive or upon the acceptance by any preferred shareholder of Fund American of his liquidation preference in cash. Provided the fractional interest constitutes a capital asset in the hands of the Fund American shareholder, gain or loss on the sale thereof will constitute capital gain or loss, and provided the preferred shares of Fund American constitute a capital asset in the hands of the Fund American shareholder, gain or loss on the receipt of the cash liquidation preference will constitute capital gain or loss. As noted above, the consummation of the acquisition is subject to a ruling from the Internal Revenue Service to the effect that the acquisition will be a tax-free reorganization and certain other rulings (see Sections 8.B and 9.C of the acquisition agreement). It is anticipated that the tax rulings, for which requests have been filed, will be received from the Internal Revenue Service by mid-October, 1968.

Reasons for Acquisition

The Boards of Directors of American Express and Fund American believe that the proposed transaction will be beneficial to both companies and their shareholders, and both boards have unanimously adopted the acquisition agreement and recommend that their shareholders vote in favor of the proposals before them, including, in the case of Fund American, the liquidation of that company.

It is believed that the respective businesses of American Express and Fund American and their subsidiaries complement each other and provide an entry for each company into financial service fields in which it is not now engaged, thus enabling the combined companies to offer a broad spectrum of financial services to the public. In addition, the acquisition will benefit the shareholders of both companies by affording them an investment in a larger and more diversified enterprise.

Consultant

The insurance department of Eastman Dillon, Union Securities & Co. provided consulting and advisory services to American Express in connection with the acquisition and will be paid a fee of $60,000. Mr. Joseph H. King, a director of American Express, is a partner of such firm.

SUBSTITUTION OF STOCK OPTIONS

Fund American presently has outstanding employee stock options under three stock option plans (see Stock Option Plans under MANAGEMENT OF FUND AMERICAN below). Upon the transfer of the assets of Fund American to a subsidiary of American Express, holders of such outstanding options will be afforded an opportunity to substitute therefor, in accordance with the provisions of the Internal Revenue Code, options to purchase preferred shares of American Express. If a tax ruling is obtained permitting use of Series $1.50 preferred shares, then shares of such series will be substituted for Fund American stock options; the number of such substituted shares will be $\frac{8}{10}$ths of the number of common shares of Fund American subject to option, and the per share option prices will be $\frac{10}{8}$ths times the per share option prices under the Fund American options. If such tax ruling is not obtained, Series $2.30 preferred shares will be substituted for Fund American stock options and the number of such substituted shares will be $\frac{7}{10}$ths of the number of common shares of Fund American subject to option, and the per share option prices will be $\frac{10}{7}$ths of the per share option prices under the Fund American options. Other terms and conditions of the substituted American Express options will be the same as the terms and conditions of the Fund American options for which they are to be substituted, so that no additional benefits will be conferred by reason of the substitution.

In the opinion of American Express the substitution of American Express options for the Fund American options will secure to American Express and its shareholders the advantages of the incentive inherent in stock ownership by participating employees upon whose judgment, initiative and efforts American Express and its subsidiaries will be largely dependent for the successful conduct of the businesses to be acquired. It is anticipated by management that the realization of such proprietary interest in American Express will provide such employees with a further incentive for remaining with and increasing their efforts on behalf of American Express and its subsidiaries.

Accordingly, the shareholders of American Express are being asked to authorize the approval of the grant of options to employees of Fund American and its subsidiaries to purchase up to 128,147 preferred shares, Series $2.30, or 146,454 preferred shares, Series $1.50, of American Express in substitution for outstanding stock options heretofore granted by Fund American to such employees.

It is intended that the substitution of options described above will meet the requirements of Section 425(a) of the Internal Revenue Code, with the result that substituted options will have the same status for federal income tax purposes as the options presently outstanding, which are intended to be restricted or qualified stock options (see Stock Option Plans under MANAGEMENT OF FUND AMERICAN below).

Fund American has agreed that it will not grant any further options under any of its stock option plans prior to the consummation of the transfer of assets. Thereafter, it is intended that no further options will be granted under the Fund American plans. Officers and key employees of the new Fund American and its subsidiaries will be eligible for the grant of options under the American Express 1968 Stock Option Plan but no such person will be permitted to exercise any such option until all options for preferred shares of American Express granted in substitution for Fund American stock options have been fully exercised or have lapsed by passage of time (see 1968 Stock Option Plan under MANAGEMENT OF AMERICAN EXPRESS below).

Fund American Investment Management Company

Fund American Investment Management Company ("Faimco") is the investment adviser and principal underwriter for the Commonwealth Group of mutual funds. Faimco is a California corporation, incorporated in 1933, which at the time of its acquisition by Fund American in January 1966 was named North American Securities Company.

The Commonwealth Group of mutual funds consists of Commonwealth Investment Company, a balanced fund; Commonwealth Stock Fund, Inc., a common stock fund; Commonwealth Income Fund, Inc., a fund for current income; and Commonwealth Capital Fund, Inc., a capital growth fund. The total assets of the Commonwealth Group of mutual funds was $380,529,263 on March 31, 1968, as compared to $298,200,387 on December 31, 1965. Faimco also manages the portfolios of other institutional investors.

The principal source of Faimco's earnings is the fees it receives for management services. The size of the fees received is directly related to the amount of assets managed. Another important source of Faimco's earnings is sales commissions on the sale of shares of the Commonwealth funds.

Faimco has investment advisory agreements with each of the Commonwealth mutual funds. Pursuant to these agreements, Faimco performs investment advisory, research, and statistical services, as well as providing management and administrative facilities, including personnel, office space and other operating facilities. As principal underwriter for the mutual funds, Faimco distributes Commonwealth shares through independent securities dealers. It also performs stock transfer and dividend disbursement services for the funds.

In accordance with the Investment Company Act of 1940, the investment advisory and underwriting agreements between Faimco and each of the Commonwealth funds provide for automatic termination upon assignment by Faimco. The investment advisory agreements may be terminated, without the payment of any penalty, by the fund or by the Board of Directors of the fund or by vote of a majority of the outstanding shares of capital stock of the fund on 30 days' written notice, or by Faimco on similar notice to the fund. The underwriting agreements may be terminated at any time by either party by written notice to the other. Unless terminated, the investment advisory and underwriting agreements are operative from year to year if they are specifically approved at least annually either by the Board of Directors of the fund, including a majority of the directors who are not parties to such agreements or affiliated persons of any such party, or by vote of a majority of the outstanding shares of capital stock of the fund.

The transfer of the assets of Fund American to a subsidiary of American Express will constitute a change in the control of Faimco, which, under the Investment Company Act, will result in the automatic termination of the present investment advisory and underwriting agreements between Faimco and each of the mutual funds. New investment advisory agreements may be executed with the approval of the holders of a majority of the outstanding shares of capital stock of each of the mutual funds, and new underwriting agreements may be executed with the approval of the Board of Directors of each mutual fund, including a majority of independent directors as described above. The Board of Directors of each mutual fund has approved a new underwriting agreement with Faimco and has recommended shareholder approval of a new investment advisory agreement with Faimco. The proposed underwriting agreements will be identical to the present agreements and the advisory agreements will be substantially identical. A provision will be added to the investment advisory agreements with Commonwealth Stock Fund, Inc., Commonwealth Income Fund, Inc., and Commonwealth Capital Fund, Inc. which provides that the fee on assets managed over $150,000,000 shall be 40/100th of 1% per annum instead of 50/100th of 1%. This provision is presently provided in the agreement with Commonwealth Investment Company.

If shareholder approval is obtained at the special meetings of the Commonwealth funds to be held on September 24, 1968, the new agreements will become effective upon the effective date of the transfer of the assets of Fund American to a subsidiary of American Express.

Defendants' Statement Under Rule 9(g)

Statement Under Rule 9(g)

The material facts as to which the moving parties contend there is no genuine issue to be tried are as follows:

1. This action was commenced on April 29, 1974.

2. American Express Fund, Inc., on whose behalf this derivative suit has been brought, is, and at all relevant times has been, a Delaware corporation with its principal place of business in California. It has no present place of business in New York and has never qualified to transact business in New York.

3. The matters complained of in this action occurred in 1968.

4. The facts constituting the alleged wrongdoing complained of have been public knowledge since 1968.

Plaintiff's Opposing Statement Under Rule 9(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONROE KORN,

Plaintiff,

-against-

FRED H. MERRILL, et al.,

Defendants.

74 Civ. 1862 (RLC)

PLAINTIFF'S OPPOSING STATEMENT
UNDER RULE 9(g)

1. Fund American Investment Management Company ("Faimco") and its successor American Express Investment Management Company ("Aeimco") had an office in New York and this office might be deemed to be an office of American Express Investment Fund, Inc. ("Fund") since Fund had no employees and Faimco and Aeimco served as its investment advisor and provided the services of some of their employees to Fund.

2. Some of the matters complained of in this action have occurred since 1968 and have continued to occur to date.

3. Only some of the facts constituting the alleged wrongdoing complained of have been public knowledge since 1968. Other facts constituting the alleged wrongdoing complained of have occurred since 1968.

4. American Express Company's ("Amexco") principal office has been located in New York at all relevant times.

Most meetings concerning the subject merger between Amexco and Fund American Company ("FAC") were held in New York and Amexco's attorneys, accountants, executives and consultants who worked on the merger were located in New York.

There exists genuine issues of material facts with respect to the question of where the causes of action alleged in the complaint "accrued" and whether Fund, through Faimco, was a "resident" of New York, within the meaning of the New York borrowing statute, CPLR 202.

Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings or for Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONROE KORN,

Plaintiff, : 74 Civ. 1862 (RLC)

-against-

FRED H. MERRILL, et al.,

Defendants.

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

This is a memorandum in opposition to defendants' motion pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure for judgment on the pleadings or for summary judgment, on the ground that the causes of action asserted in the Complaint are barred by the statute of limitations. In essence, defendants assert that even though this action is pending in this district, and this Court has recently denied defendants' motion for transfer pursuant to 28 U.S.C. § 1404(a), the six-year New York statute of limitations does not apply, but rather, the shorter California statute of limitations applies.

Plaintiff herein, a New York resident, who has resided in New York continually for at least the last

twenty years*, brings this stockholder derivative action on behalf of American Express Investment Fund Inc. ("Fund"). The gravamen of the Complaint is that Fund's investment advisor, a fiduciary of the Fund, illegally sold its advisory status; that the proxy statement which was issued to Fund's shareholders in connection with that sale was false and misleading and that the advisory and underwriting fees paid by Fund since the merger have been paid illegally and should be returned to Fund. The Complaint alleges that in late 1968 American Express Company ("Amexco"), through a subsidiary, purchased all of the assets of the Fund American Company ("FAC") ("the merger"), including its wholly owned Fund American Investment Company ("Faimco") which was the investment advisor to Fund (then known as Commonwealth Investment Company). Faimco is now known as American Express Investment Management Company ("Aeimco").

The Complaint asks that defendants, other than Fund, be required to pay to Fund and its shareholders, the profits earned on the sale of Fund's investment advisor. The Complaint also asks that the Investment Advisory Agreement and the Underwriting Agreement between FAimco and Fund be rescinded, and that Faimco, Aeimco, and American Express be required to return all consideration received

*Affidavit of Monroe Korn, sworn to August 21, 1974, given in opposition to defendants' motion for change of venue ("the Korn Affidavit"). The Korn Affidavit is incorporated by reference herein.

by them by virtue of said Agreements. Therefore, the wrongs sued for by plaintiff are twofold: (1) the illegal profits earned by defendants, other than Fund, due to the 1968 sale of Fund's investment advisor and (2) the return to Fund and its shareholders, of all consideration paid by Fund to Aeimco and Faimco since the merger. The payment by Fund of investment advisory and underwriting fees to Faimco and Aeimco is a continuing violation and defendants cannot seriously contend that it is barred by the statute of limitations.

Defendants do allege, however, that insofar as the Complaint is based upon a cause of action which accrued in 1968, that cause of action is barred by the California statute of limitations since the Complaint was filed in 1974, and the longest California statute is four years. Under the six-year New York statute of limitations, however, the Complaint would not be barred.

The Complaint is brought under the Investment Company Act of 1940, 15 U.S.C., § 80(a)-1 et seq., the Investment Advisor Act of 1940, 16 U.S.C., § 80(b)-1 et seq., and the Securities Exchange Act of 1934, 15 U.S.C., § 78(a)-1 et seq., none of which provides any statute of limitations which would be applicable to the instant action. Defendants recognize that in the absence of a federal statute of limitations, the courts will look to the statute of limitations applicable to a similar cause of action in the forum state.

Cope v. Anderson, 331 U. S. 461, 463 (1947). Clearly, the six-year New York statute of limitations applies to this case, but defendants mistakenly allege that the New York borrowing statute C.P.L.R. § 202, applies. That statute applies, however, only in situations where (1) the causes of action in question accrued outside of New York and (2) the plaintiff is not a resident of New York. Neither of these conditions is met in this case. The New York borrowing statute provides:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

I - THE CAUSES OF ACTION HEREIN ACCRUED IN NEW YORK

In its opinion, filed in this matter on April 7, 1975, denying defendants' motion for transfer pursuant to 28 U.S.C. § 1404(a), this Court recognized that negotiations concerning the merger took place in New York, that attorneys and accountants who worked on the merger and submitted reports with respect thereto, were and are located in New York, and that key witnesses and documentary material are in New York. In fact, as pointed out in plaintiff's memorandum in

opposition to defendants' transfer motion, defendants' answers to the Interrogatories Relating To Change Of Venue reveal that of the thirty-one meetings held in connection with the merger, twenty were held in New York, eight in San Francisco and three in Washington, D.C. In essence, Amexco, a New York corporation with its executives, consultants, attorneys, accountants and principal offices located in New York, acquired FAC and Faimco whose principal offices were located in San Francisco. FAC was a nation-wide concern with subsidiaries throughout the country, and in 1968, Faimco had a New York office. Amexco employed three New York consultants in connection with the merger.

Defendant, Amexco, was named as a defendant herein for knowingly joining and encouraging Faimco to breach its fiduciary duty owed to Fund. Jackson v. Smith, 254 U.S. 586, 588-9 (1921); Irving Trust Co. v. Deutsch, 73 F. 2d 121, 125 (Ca. 2, 1934) cert. denied, 294 U.S. 708 (1935). As described above, nearly all of Amexco's activities, in connection with the merger, occurred in New York. Amexco is not being sued for breach of fiduciary duty or for sending out a misleading proxy statement; rather, Amexco is being sued because it knowingly joined and encouraged a fiduciary in a breach of its duty. As set forth above, Amexco's activities occurred in New York and the cause of action

against it clearly arose in New York.

It is also clear, however, that the cause of action, concerning the proxy violation asserted against defendants, also arose in New York. Although the proxy may have been mailed from California, it was received by plaintiff in New York. It is horn-book law that the violation of the proxy laws occurs when the proxy is received. Thus, in Zorn v. Anderson, 263 F. Supp. 745, 748 (S.D.N.Y., 1966), the Court held that the mailing of plaintiff's proxy into this district constituted an "act or transaction constituting the violation," asserted under the securities laws*. Cf. Clapp v. Stearns, 229 F. Supp. 305 (S.D.N.Y., 1964). As set forth in the Complaint, the proxy violation is inextricably interwoven with the alleged breach of fiduciary duty.

Defendants assert, cavalierly, that the cause of action herein arose in California. The cases in this Circuit, however, have recognized that it is not at all clear and a very difficult question to ascertain where a cause of action accrues.

In George v. Douglas Aircraft Co., 332 F. 2d 73 (CA 2, 1964), plaintiffs were citizens of Texas, who were the crew of an aircraft which crashed in Florida. The

*In J. I. Case Co. v. Borak, 377 U. S. 426, 432 the Court recognized that injury suffered from a misleading proxy statement "ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder."

aircraft had been manufactured and delivered by defendant in California. The Court stated that to determine whether liability existed "we think New York would look to the law of the place of injury, here Florida, rather than to the law of the place of manufacture or of delivery." 332 F. 2d at 76. With respect to the New York borrowing statute, however, the Court concluded that "despite general statements that a tort action inevitably 'arises' where the last act necessary to establish liability occurred, we predict that New York would hold that plaintiffs' cause of action here 'arose' in California." 322 F. 2d at 79. The Court characterized the place-of-accrual test as "'ambiguous' if not 'entirely unworkable'" stated that "we cannot be wholly confident as to the accuracy of that prediction" (that the cause of action arose in California) and proceeded to also consider the issue as if the Florida statute of limitations governed, 332 F. 2d at 79.

In Nielson v. Avco Corporation, 54 F.R.D. 76 (S.D.N.Y., 1971), where plaintiffs, who were residents of British Columbia, brought action for wrongful death, personal and property injury due to an airplane crash in Alberta, and the engine installed in the aircraft was manufactured in Pennsylvania, Judge Gurfein "prophesized" that under the New York borrowing statute the cause of action for wrongful death "accrued" in Alberta. In reaching

this conclusion, the Court stated that prophecy of where the New York courts would say the cause of action accrued is "indeed difficult, particularly when the recent choice of law cases have been decided by votes of four to three in the New York Court of Appeals."

In Sack v. Low, 478 F. 2d 360 (CA 2, 1973), cited by defendants herein, where plaintiffs, residents of Massachusetts, had purchased securities through the New York defendants, the Court thought that Massachusetts law might apply but held that the record "does not contain sufficient facts to enable us to apply our prediction of New York law with complete confidence." (478 F. 2d at 367). While citing George with approval, and recognizing that it had found no New York decision in point, the Court stated that it believed that New York courts, in actions for fraud and deceit, would apply the rule of the First Restatement of Conflicts* that "when a person sustains loss by fraud, the place of wrong is where the loss is sustained," (478 F. 2d at 365). In George, of course, the Court applied the law of the place of the manufacture and delivery and not the law of the place of injury.

Therefore, the only teaching which is clear from these cases is that the law is confused with respect to

*Later, the Court stated that it recognized that the "rigid rules of the First Restatement have been largely discredited as a sensible approach to solving choice of law problems," (478 F. 2d at 366).

the question where a cause of action accrues under the New York borrowing statute. In any event, the instant suit is clearly distinguishable from Sack. This is not an action based on fraud to recover "losses" but rather is basically an action for breach of fiduciary duty to recover "profits"*. As such, this suit is akin to an action for an accounting, and the issue of where profits were earned and where the causes of action arose is far different from the fact situation in Sack.

It is clear, however, that most of the meetings concerning the merger took place in New York, the bulk of Amexco's activities in connection with the merger took place here, and plaintiff, who has resided here for at least the past twenty years, received the subject proxy statement here. Under the circumstances, the causes of action accrued here.

II - THIS ACTION IS BROUGHT BY A RESIDENT OF NEW YORK

The purpose of the New York borrowing statute is to "prevent non-residents from shopping for the forum with the most favorable statute of limitations." Boutin v.

*Also, there is no requirement under § 14(a) of the Exchange Act that fraud (scienter) must be proved for a proxy violation. Sirota v. Econo-Car. 1974 C.C.H., Sec. L. Rep. para. 94,362 (S.D.N.Y.)

Cumbo, 259 F. Supp. 12, 13 (S.D.N.Y., 1966); Jones v. Greyhound Bus Lines, 73 Misc. 2d 109, 341 N.Y.S. 2d, 159 (1974); Practice Commentaries, McKinney's Consolidated Laws of New York, Vol. 7B, C.P.L.R. § 202, at page 81. Here, as set forth in the Korn Affidavit, plaintiff has been a resident of New York for at least twenty years.* He purchased his shares of Fund in New York, through a New York broker. It is clear that plaintiff has not shopped for the forum with the most favorable statute of limitations but brought suit in New York where he resides. Plaintiff clearly has an interest in this litigation. His investment in Fund is involved herein and the outcome of this suit may increase the value of Fund and of his shares in Fund. Plaintiff should be entitled to the benefit of the laws of New York, the state where he made his investment and has resided for more than twenty years.

*The only authority cited by defendants for the proposition that under the New York borrowing statute, the residence of the nominal defendant corporation applies rather than the residence of plaintiff is a footnote in a district court case decided seven years ago, which held that since there were disputed questions of fact, the applicability of C.P.L.R. 202 would be left until trial. Norte & Co. v. Krock, CCH Fed. Sec. L. Rep. para. 92, 295 (1968). In any event, defendants' answers to interrogatories reveal that Faimco, Fund's advisor, had an office in New York in 1968 and that Fund itself had no employees. Therefore, discovery in this action may disclose that Fund, through Faimco, was a "resident" of New York in 1968 within the meaning of C.P.L.R. 202.

III - THERE ARE DISPUTED ISSUES OF FACT WHICH PRECLUDE ENTRY OF SUMMARY JUDGMENT

It is undisputed that motions for summary judgment should be viewed with extreme caution and should not be granted where there is any disputed fact. On a motion for summary judgment, the record will be viewed in the light most favorable to the party opposing the motion, and the opposing party should be accorded any and all favorable inferences. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962). In a stockholder's derivative action, "summary judgment should rarely be granted against a plaintiff." Schoenbaum v. Firstbrook, 405 F. 2d 215, 218 (CA 2, 1968), cert. denied, 395 U. S. 906.

Here, it is clear that there are disputed questions of fact with respect to the issues of where the cause of action "accrued" and whether Fund through its investment advisor Faimco, was a "resident" of New York in 1968, within the meaning of the New York borrowing

statute.* As set forth, supra, even in Sack and Norte, cited by defendants, the Courts did not decide whether the New York borrowing statute applied but held that the record was insufficient to make a determination. The law with respect to the question of where a cause of action accrues under the New York borrowing statute is far from clear. In light of the significant New York activities engaged in by the parties in connection with the merger and the disputed questions of fact, summary judgment should not be granted.**

The Complaint on its face indicates that defendants' activities amount to patent wrongdoing as defined by the Second Circuit in Rosenfeld v. Black, 445 F. 2d 1337 (CA 2, 1971). Defendants should not be able to immunize their breach of fiduciary duty by hiding behind technicalities. Defendants' attempt to deny plaintiff his day in Court should be rejected.

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* As set forth, supra, defendants' answer to Plaintiff's Interrogatories (First Series), interrogatories 41 and 42, reveal that "Fund had no employees" but that Faimco employed persons whose services were furnished to Fund. Discovery may reveal that Fund was, in effect, a shell and that in 1968 it can be deemed to be a New York "resident" through the office and activities of Faimco in New York.

** Since defendants must rely upon the affidavit and exhibits submitted on the motion, this must be construed as a motion for summary judgment, not a motion for judgment on the pleadings.

CONCLUSION

The Complaint herein seeks payment to Fund of (1) all profits earned due to the illegal sale in 1968 of Fund's investment advisor and (2) the return to Fund of all consideration paid since the merger by it for investment advisory and underwriting fees. The payment by Fund of investment advisory and underwriting fees is still continuing and defendants cannot seriously contend that this aspect of the cause of action and requested relief is barred by any statute of limitations.

Even the aspect of the cause of action and requested relief which arose in 1968 is not barred by the statute of limitations. That cause of action accrued in New York and the suit is brought by a New York plaintiff. The purpose of the New York borrowing statute is to prevent non-resident New York plaintiffs from shopping for a forum with a favorable statute of limitations. Plaintiff herein has not shopped for any forum but brought this suit in New York where he has resided for at least twenty years and where he purchased the shares in question.

The disputed issues of fact with respect to the issues of (1) whether Fund, through Faimco, was a "resident" of New York and (2) where the causes of action accrued under the New York borrowing statute, coupled with the lack of

clarity of the law concerning this issue, make these issues inappropriate for summary judgment.

It is respectfully submitted that defendants' motion should be denied.

Dated: New York, New York
May 30, 1975.

Respectfully submitted,

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Robert N. Kaplan
James B. Kilsheimer III

Of Counsel

Opinion and Order of Honorable Robert L. Carter Granting Defendants' Motion for Judgment on the Pleadings or Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MONROE KORN,

Plaintiff,

- against -

FRED H. MERRILL, REID W. DENNIS, S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY and RICHARD F. THARP, JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company), FUND AMERICAN COMPANIES, AMERICAN EXPRESSS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC.,

Defendants.

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#43335

U.S. DISTRICT COURT
FILED
NOV 5 1975
S.D. OF N.Y.

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CARTER, District Judge

O P I N I O N

Plaintiff has instituted this derivative action on behalf of defendant, American Express Investment Fund, which prior to April 27, 1970, was known as the Commonwealth Investment Company. The action was commenced on April 29, 1974, and alleges violations of the Investment Company Act of 1940, 15 U.S.C. §80a-1 et seq.; the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq.; the Investment Advisers Act of 1940, 15 U.S.C. §80b-1 et seq.; and the rules and regulations issued pursuant to these statutes. Defendants have moved for an order, pursuant to F.R.Civ.P. 12(c) and 56(b), granting them judgment on the pleadings or summary judgment on the ground that the cause of action asserted in the complaint is barred by the statute of limitations.[1/] The critical issue before the court is whether the undisputed facts in the record show, as a matter of law, that plaintiff cannot successfully refute defendants' plea of limitations. Since we agree that he cannot, the motion is granted.

1/ Since affidavits and exhibits have been submitted on the motion, it will be treated as one for summary judgment.

Monroe Korn is a New York resident and a shareholder of American Express Investment Fund, Inc. (Fund), an open-end investment company, since at least January, 1968. In 1968 and for several years prior thereto defendant Fund American Investment Management Company (FAIMCO), now known as the American Express Investment Management Company (AEIMCO), served as investment advisor to Fund pursuant to an investment advisory agreement between Fund and FAIMCO. In addition, pursuant to an underwriting agreement between Fund and FAIMCO, in 1968 and for several years prior thereto, FAIMCO also served as principal underwriter for shares of stock of Fund sold to the public on a continuous basis. FAIMCO was, at that time, a wholly-owned subsidiary of defendant, the Fund American Companies (FAC), now known as FA Liquidating Corporation.

The causes of action asserted arise out of the acquisition in the fall of 1968 of a newly formed and wholly-owned subsidiary of defendant American Express Company (AMEXCO) of substantially all the assets of FAC, including all the outstanding shares of FAIMCO, in exchange for shares of AMEXCO preferred stock, which shares were then distributed to the stockholders of FAC.

The pertinent facts gleaned from the complaint and various affidavits of the parties are as follows. [2/] Fund is a Delaware corporation with principal offices in California. As of September 28, 1968, Fund had net assets of $192 million and some 27,000 shareholders. While the record is devoid of any breakdown as to New York and California addresses of Fund shareholders in 1968, the figures as of September 28, 1973, indicate that there were 7,643 California shareholders holding over seven million outstanding shares of Fund, and 2,345 New York shareholders holding over one-and-one-half million shares.

Both FAIMCO and FAC are California corporations with their principal offices in California. FAIMCO acted as investment adviser to Fund and as

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2/ For purposes of a motion for summary judgment, any doubt as to the existence of a genuine issue of material fact will be resolved in favor of the party opposing the motion. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Furthermore, facts asserted by the party opposing the motion, if supported by affidavits or other evidentiary material, will be regarded as true. See, e.g., First National Bank of Cincinnati v. Pepper, 454 F. 2d 626, 629 (2d Cir. 1972).

its principal underwriter for the continuous public sale of Fund stock. Pursuant to the advisory agreement entered into between FAIMCO and Fund, FAIMCO was to render investment advice to Fund, determine what securities Fund should buy and sell, and provide various management services to Fund including executive and other personnel, office space and equipment. As consideration for these services, FAIMCO received an annual advisory fee based on one-half of 1% of the average daily net assets of Fund up to $150 million, and 4/10th of 1% of the net assets in excess of that figure.

In 1968, AMEXCO, a New York corporation with its principal place of business in New York, entered into an agreement to acquire control of FAIMCO by acquiring substantially all of the assets of FAC. The agreement provided that AMEXCO would issue to FAC shareholders shares of its preferred stock having an aggregate value in 1968 of approximately $415 million. Consummation of the agreement was made dependent on the fulfillment of two conditions precedent: (1) that the Fund shareholders approve reinstatement of the advisory agreement between Fund and FAIMCO after the AMEXCO takeover; and (2) that the Fund Board of Directors

approve reinstatement of the Fund-FAIMCO underwriting agreement. 3/

In August, 1968, Fund's Board approved reinstatement of the underwriting agreement, and authorized sending out a proxy statement with notice of the annual meeting on September 28, 1968 recommending approval of the reinstatement of the advisory agreement. The agreement, which constituted an effective merger of FAIMCO into American Express, was thereafter duly effectuated.

At the time when these negotiations took place and the merger with American Express was accomplished, defendants Fred H. Merrill, Reid W. Dennis, S. Waldo Coleman, Herbert E. Dougall, Wallace H. Fulton, William Wallace Mein, Jr., George E. Osborne, Philip A. Ray and Richard F. Tharp were directors of Fund. Dennis (president) and Tharp(vice-president) were officers of Fund. Merrill, Dennis and Tharp were also directors of FAIMCO, and Dennis (president) and Tharp (vice-president) were officers of

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3/ Such approvals were required by the provisions of the Investment Advisers Act of 1940, 15 U.S.C. §80a-15, since the change in controlling ownership of FAIMCO automatically terminated the existing investment advisory and underwriting agreements.

that company. Merrill was a director of FAC and he (president) and Tharp (senior vice-president) were officers of FAC.

The gravamen of plaintiff's complaint is that FAIMCO, while Fund's investment advisor and a fiduciary of Fund, illegally sold its advisory status; that the proxy statement which was issued to Fund's shareholders in connection with the AMEXCO purchase of FAC assets (including FAIMCO) was false and misleading, and that the advisory and underwriting fees paid by Fund since the merger have been paid illegally and should be returned to Fund.

The complaint asks that defendants, other than Fund, be required to pay to Fund and its shareholders the profits earned on the sale of FAIMCO. Furthermore, the complaint also asks that the Investment Advisory Agreement and the Underwriting Agreement between FAIMCO and Fund be rescinded, and that FAIMCO, AEIMCO and AMEXCO be required to return all consideration received by them since the merger by virtue of these agreements.

Discussion

1. The Statute of Limitations and the New York "Borrowing Statute"

Defendants assert that this action, commenced on April 29, 1974, and based on a cause of action which accrued in 1968, is barred by the relevant California statute of limitations. Under the six-year New York statute of limitations, [4/] however, the action would clearly not be barred.

4/ Where the federal cause of action being sued upon has no exact counterpart in state law, we are required to apply the limitations period of the state cause of actica most closely analogous to the federal claims. UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); Weinberger v. New York Stock Exchange, 335 F. Supp. 139, 145 (S.D.N.Y. 1971); Hornblower & Weeks-Hemphill, Noyes v. Burchfield, 366 F. Supp. 1364, 1367 (S.D.N.Y. 1973). We find that the following provisions of New York C.P.L.R. §213 (providing that actions must be commenced within six years) are the most directly applicable to the instant action:

> 8. an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith;
>
> 9. an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it.

As noted above, this action is brought under the Investment Company Act of 1940, 15 U.S.C. §80a-1 et seq., the Investment Advisers Act of 1940, 15 U.S.C. §80b-1 et seq., and the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq. None of these federal statutory provisions allegedly violated by defendants incorporates a statute of limitations applicable to civil actions for their violation. Nor is there any general federal statute of limitations applicable to civil actions for the violation of federal statutes. In such instances where Congress creates a federal right but does not prescribe a period for its enforcement, the federal court will "borrow" the statute of limitations applicable under the law of the forum state. 5/

5/ UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 703-05 (1966); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946); Klein v. Bower, 421 F. 2d 338, 342-43 (2d Cir. 1970); Esplin v. Hirschi, 402 F. 2d 94, 101-03 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.) cert. denied, 368 U.S. 821 (1961); Fischman v. Raytheon Mfg. Co., 188 F. 2d 783, 787 (2d Cir. 1951); Saylor v. Lindsley, 302 F. Supp. 1174, 1179 (S.D.N.Y. 1969).

Such a reference to New York limitations law includes the borrowing statute. Cope v. Anderson, 331 U.S. 461 (1947); Sack v. Low, 478 F. 2d 360, 365 (2d Cir. 1973); Hornblower & Weeks-Hemphill, Noyes v. Burchfield, 366 F. Supp. 1364, 1367 (S.D.N.Y. 1973); Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 179 F. Supp. 163, 164 (S.D.N.Y. 1959).

The New York borrowing statute, C.P.L.R. §202 provides:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply." 6/

Thus, New York will borrow the limitations law of a foreign state only where (1) the cause of action being sued upon accrued outside of New York,

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6/ The Revisers comment makes clear that the phrase "the state" has been used throughout the C.P.L.R. to mean New York. See Official Reports to Legislature, 6th Report Leg. Doc. (1962) No. 8, at 69.

and (2) the plaintiff is not a resident of New York. If either of these conditions is not met the borrowing statute will not apply, and under the facts of this case the six-year New York statute of limitations will govern, C.P.L.R. §213, and plaintiff's claim will not be time-barred. We therefore proceed to examine each of these elements.

A. Plaintiff's Residence

It is undisputed for purposes of this motion that plaintiff Korn is a New York resident.[7/] Defendants assert, however, that the alleged cause of action accrued in favor of Fund--a non-resident of New York.[8/] As such,

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7/ Affidavit of Monroe Korn, sworn to August 21, 1974, given in opposition to defendants' motion for change of venue.

8/ It is clear that a foreign corporation, even if qualified to do business in New York, is a nonresident for purposes of C.P.L.R. §202. American Lumbermens Mut. Cas. Co. of Ill. v. Cochrane, 129 N.Y.S. 2d 489, 491 (Sup. Ct.), aff'd, 284 App. Div. 884, 134 N.Y.S. 2d 473 (1st Dept. 1954), aff'd, 309 N.Y. 1017, 133 N.E. 2d 461 (1956).

defendants contend that the first requirement for the application of the New York borrowing statute has been met. We agree.

A derivative action is brought by one or more shareholders to enforce a right of a corporation, the corporation having failed to enforce such a right which may be properly asserted by it. See F.R.Civ.P. 23.1. The distinction between a derivative and an individual cause of action was described by Mr. Justice Frankfurter dissenting in Swanson v. Traer, 354 U.S. 91, 99 (1957), as follows:

> "The contrasting difference between a stockholder's suit for his corporation and a suit by him against it, is crucial. In the former, he has no claim of his own; he merely has a personal controversy with his corporation regarding the business wisdom or legal basis for the latter's assertion of a claim against third parties. Whatever money or property is to be recovered would go to the corporation, not a fraction of it to the stockholder. When such a suit is entertained, the stockholder is in effect allowed to conscript the corporation as a complainant on a claim that the corporation, in the exercise of what it asserts to be its uncoerced discretion, is unwilling to initiate. This is a wholly different situation from that which arises when the corporation is charged with invasion of the stockholder's independent right."

Thus, it is well established that an action to redress injuries to a corporation, whether arising out of contract or tort, cannot be maintained by a stockholder in his own name but must be brought in the name of the corporation, since the cause of action being in the corporation, the stockholder's rights are merely derivative and can be asserted only through the corporation. See, e.g., Schaffer v. Universal Rundle Corporation, 397 F. 2d 893, 896 (5th Cir. 1968).

It follows from this general principle that a shareholder suing on behalf of a corporation is possessed of no greater rights than those which the corporation itself possesses. Thus, if an action by the corporation would be barred, suit by the stockholder would likewise be barred. Drews v. Eastern Sausage & Provision Co., 125 F. Supp. 289, 291 (S.D.N.Y. 1954).

In Drews v. Eastern Sausage & Provision Co., supra, plaintiff sued individually on four causes of action and as a shareholder on behalf of certain corporations on four other causes of action. The Court found that the statute of limitations was tolled on plaintiff's individual claims during the time he was an enemy alien and hence unable to bring suit. The derivative causes of action were, however, held to be barred:

"It is commonly said that in a stockholders' suit the cause of action 'belongs to the corporation', not to the stockholders individually or collectively, and that the instigator of the action on behalf of the corporation is a mere nominal plaintiff. Recovery is on behalf of the corporation, the shareholder can enforce only such claims as the corporation itself could enforce, and it follows that if an action by the corporation is barred, suit by the stockholder is barred." 9/ 125 F. Supp. at 291 (citations omitted.

9/ Further evidence in support of the proposition that the cause of action in a derivative suit accrues on behalf of the injured corporation rather than the plaintiff shareholder is found in the venue requirements for a stockholder's derivative action. 28 U.S.C. §1401 provides:

"Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants". (Emphasis added).

Thus, while ordinarily plaintiff's choice of forum is entitled to great weight, it is recognized that that choice is accorded little significance in a derivative action since it is, in essence, the corporation's and not the individual plaintiff's cause that is being sued upon. Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 522 (1947); Schlusselberg v. Werly, 274 F. Supp. 758, 763 (S.D.N.Y. 1967). It is therefore obvious that the venue statute is not concerned with facilitating suit in the district of the shareholder's residence, but assures only that suit can be brought in any district in which the corporation could have sued. Koster, supra, at 522 n.2.

We therefore hold that for purposes of the application of the New York borrowing statute, C.P.L.R. §202, to a stockholder's derivative suit, the cause of action accrues "in favor of" the corporation and not the shareholder plaintiff. See Norte & Co. v. Krock, CCH Fed. Sec. L.Rep. ¶92,295 n.8 (S.D.N.Y. 1968).[10/] Were we to hold otherwise, "the distinction between a stockholder's derivative claim and a claim exercised in his primary right would disappear, and the public policy based strictures on derivative suits could be avoided merely by asserting that economic harm to a corporation in itself constituted justiciable personal injury to each owner of stock in the corporation." Ash v. International Business Machines, Inc., 353 F. 2d 491, 494 (3rd Cir. 1965), cert. denied, 384 U.S. 927 (1966). Since Fund is a Delaware corporation with its principal place of business in California, and has never qualified to transact business in New York, the

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10/ But see, Saylor v. Lindsley, 302 F. Supp. 1174, 1180 n.10 (S.D.N.Y. 1969).

first test for the application of C.P.L.R. §202 has been met. 11/

B. Where the Cause of Action Accrued

In Sack v. Low, 478 F. 2d 360, 365 (2d Cir. 1973), the court found that in an action for fraud and deceit based on violations of federal securities laws, the New York courts would follow the rule of the First Restatement of Conflicts that "when a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations

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11/ Plaintiff contends that FAIMCO (and its successor AEIMCO), Fund's investment advisor, had an office in New York and that it is a material issue of fact whether Fund, which had no employees of its own, may, through FAIMCO, be considered a New York resident for purposes of C.P.L.R. §202. This contention is without merit. Even assuming the correctness of plaintiff's factual allegations, as we must for purposes of this motion, it is well settled that a foreign corporation (i.e., a corporation created under the laws of a state other than New York, C.P.L.R. §105(g)), is treated as a non-resident for purposes of C.P.L.R. §202. See note 7, supra. Fund, as noted above was at all relevant times a Delaware corporation with its principal place of business in California. FAIMCO (and AEIMCO) has at all relevant times been a California corporation with its principal place of business in California.

are made." 12/ The court went on to suggest that its position was in line with the weight of authority in other jurisdictions which generally adopted the view of the First Restatement of Conflicts "that a cause of action for fraud arises where the loss is sustained and that loss from fraud is deemed to be suffered where its economic impact is felt, normally plaintiff's residence." Id., at 366, and cases there cited. 13/

12/ 478 F. 2d at 365, citing First Restatement of the Conflict of Laws §377, note 4 (1934). While the court recognized "that the rigid rules of the First Restatement have been largely discredited as a sensible approach to solving choice of law problems", 478 F. 2d, at 366, the Court nonetheless felt that the more flexible, interest-balancing approach of Babcock v. Jackson, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743 (1963), and its progeny would not apply to the problem where a cause of action arose for purposes of the borrowing statute. See, Note; Choice of Law and the New York Borrowing Statute; A Conflict of Rationales, 35 Albany L.Rev. 754, 762 (1971).

13/ Even if we were to ignore the situs of the injury test as set forth in Sack v. Low, supra, and instead adopt a test based on the place where the alleged wrongful acts were committed, the cause of action asserted by plaintiffs may nonetheless be said to have accrued in California. There is no dispute that the following transactions which are complained of in this action occurred in the state of California: (1) The Agreement and Plan of Reorganization dated as of July 22, 1968 between AMEXCO and FAC, pursuant to which a wholly-owned subsidiary of AMEXCO acquired the shares of FAIMCO, became a binding agreement upon the parties when executed by Fred H. Merrill on

(Footnote continued)

Since Fund has its principal place of business in California, and since its economic loss, if any, would be focused there, we hold that for purposes of C.P.L.R.

(Footnote continued from previous page)

behalf of the AMEXCO subsidiary and Robert P. J. Cooney on behalf of FAC, in the offices of FAC in California on September 16, 1968. (2) The meeting of the Board of Directors of Fund, at which a new underwriting agreement between FAIMCO and Fund was approved, took place in California on June 18, 1968. At this meeting the Board of Directors of Fund also resolved to recommend to the stockholders of Fund that a new investment advisory agreement between Fund and FAIMCO be approved. (3) The proxy material of Fund for the special meeting of its stockholders held September 24, 1968, was prepared in California, and was mailed from California on or about August 16, 1968. The meeting itself was held in California on September 24, 1968. (4) The new investment advisory agreement between Fund and FAIMCO and the new underwriting agreement between Fund and FAIMCO were executed in California on October 31, 1968. (5) The closing between AMEXCO and FAC, pursuant to which substantially all the assets of FAC, including the outstanding shares of FAIMCO, were transferred by FAC to a newly formed subsidiary of AMEXCO in exchange for the securities of AMEXCO, took place in California on October 31, 1968. (See Affidavit of Fred H. Merrill, at 4-5).

While it is true that numerous negotiations concerning the merger took place in New York and that various attorneys, accountants and other personnel who worked on the merger for American Express were located in New York, this is insufficient to negate the overwhelming evidence that the activities complained of were carried out primarily in California.

Finally, we note that even if this action may be thought of as having accrued both in New York and California, the Second Circuit has indicated that the cause of action is still deemed to have accrued "without the state" for purposes of C.P.L.R. §202. Thus, in Sack v. Low, supra, the court noted:

(footnote continued)

Since both requirements of §202 have been met, California

(Footnote continued from previous page)

> "The conclusion the plaintiffs would apparently have had us draw is that since the cause of action could be said to have accrued in both states, the borrowing statute would not apply. However, application of the statute depends on whether it can be said that the cause of action accrues 'without the state,' and if it could fairly be said that the cause of action arose in both New York and Massachusetts, then, under the letter of the borrowing statute, the action would be barred.
>
> ...
>
> There is much to be said for thus recognizing that a cause of action can arise in more than one place and, under an appropriate borrowing statute, is barred if the statute of limitations has run in one where the defendant was available for suit, at least when the one is the state of plaintiff's residence. Such a rule avoids the mechanical nature of the single place of arising theory, allows the defendant to ascertain the applicable time period with certainty while affording the plaintiff a fair opportunity to sue in a convenient forum, and prevents local courts from being cluttered with actions that could have been brought elsewhere but are now time-barred there ... ." 478 F. 2d at 368.

It is clear that this case might have been brought in the Northern District of California. All the named individual defendants and over one-third of the FAC shareholders reside there. All the corporate defendants, except American Express, have their principal place of business there, and American Express, although a New York corporation, is doing business in the Northern District of California, maintains offices there and is amenable to service of process there.

14/ Fund, on whose behalf this action has been brought has, at all relevant times, been a

(Footnote continued)

limitations law will govern the timeliness of this action.

II. The California Statute of Limitations

Section 338 of the California Code of Civil Procedure specifies a three-year limitations period for:

> "1. An action upon a liability created by statute, other than a penalty or forfeiture.
>
> ...
>
> "4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

(Footnote continued from previous page)

Delaware corporation with its principal place of business in California. Plaintiffs apparently concede that if foreign law is to govern the limitations period then it is California limitations law that must be looked to. Nevertheless, even were we to apply the Delaware statute of limitations, this action would nonetheless be barred by the three year statute of limitation, §8106 of Title 10 of the Delaware Code. The three year statute of limitations has been held to apply to shareholder derivative actions which seek recovery of damages or other essentially legal relief. Halpern v. Barran, 313 A. 2d 139 (Del. Ch. 1973).

In United California Bank v. Salik, 481 F. 2d 1012 (9th Cir.), cert. denied, 414 U.S. 1004 (1973), the court applied the three-year fraud statute of limitations of §338(4) to an action under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j (b). See also, Smith v. Guaranty Service Corp., 51 F.R.D. 289, 294-295 (N.D. Calif. 1970). This three-year statute has been applied in the context of other securities law violations as well. See, Hecht v. Harris, Upham & Co., 430 F. 2d 1202. 1210 (9th Cir. 1970) (Section 17 (a) of the Securities Act of 1933, 15 U.S.C. §77q(a); Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78t(a)); Sackett v. Beaman, 399 F. 2d 884, 890 (9th Cir. 1968) (Sections 17 and 22 of the Securities Act of 1933, 15 U.S.C. §§77q and 77v, and Sections 10 and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§78j and 78aa, and Rule X-10B-5 of the Commission, 17 C.F.R. 240.106-5); Turner v. Lundquist, 377 F. 2d 44, 46 (9th Cir. 1967) (Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q). See also, Royal Air Properties, Inc. v. Smith, 312 F. 2d 210, 214 (9th Cir. 1962); Errion v. Connell, 236 F. 2d 447, 455 (9th Cir. 1956); Fratt v. Robinson, 203 F. 2d 627, 634-35 (9th Cir. 1953).

Holmberg v. Armbrecht, 327 U.S. 392 (1946) held that where a cause of action is federally created but the limitations law of the forum state is looked to, and the action is equitable in nature, federal law will apply in determining the date on which the statute of limitations begins to run. This doctrine was extended in Moviecolor Limited v. Eastman Kodak Company, 288 F. 2d 80, 85 (dictum), cert. denied, 368 U.S. 821 (1961) to include cases at law as well as equity. It has generally been held that the statute of limitations will begin to run only from the date of the discovery of the fraud or from the date the fraud should upon reasonable inquiry have been discovered. See, e.g., Janigan v. Taylor, 344 F. 2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965); Vanderboom v. Sexton, 422 F. 2d 1233, 1240 (8th Cir. 1970). In any event, the "federal" rule for the commencement of the limitations period is identical with California doctrine. See, e.g., Turner v. Lundquist, 377 F. 2d 44, 46-47 (9th Cir. 1967); Von Brimer v. Whirlpool Corp., 367 F. Supp. 740, 745 (N.D. Cal. 1973); Boeseke v. Boeseke, 107 Cal. Rptr. 353, 358, 31 Cal. App. 3d 462 (Ct. App. 1973), aff'd, 112 Cal. Rptr. 401, 10 Cal. 3d 844 (1974); Schneider v. Union Oil Co. of California, 86 Cal. Rptr. 315, 6 Cal. App. 3d 987 (Ct. App. 1970); Helfer v. Hubert, 24 Cal. Rptr. 900, 208 Cal. App. 2d 22 (Ct. App. 1962).

The record reveals, and plaintiff has not denied, the existence of numerous facts sufficient in the view of this court as a matter of law to have put plaintiff upon notice and inquiry, and to have caused him to commence the running of the period of limitation.[15/]

Plaintiff also brings a cause of action founded upon the alleged breach by FAIMCO of its fiduciary duty as investment advisor to Fund.[16/] Such a cause of action is governed by the residual four-year statute of limitations of §343 of the California Code of Civil

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15/ Despite the fact that the events which give rise to plaintiff's cause of action have been public knowledge since 1968 as a result of the proxy statements of Fund, AMEXCO and FAC describing the acquisition complained of, plaintiff in his 9(g) statement, contends that "only some of the facts constituting the alleged wrongdoing complained of have been public knowledge since 1968." Nowhere in his papers, however, does plaintiff adduce any evidence in support of this contention. Such vague and conclusory allegations are insufficient to meet the requirements of Rule 56. See, e.g., Dressler v. The MV Sandpiper, 331 F. 2d 130 (2d Cir. 1964); D.M. & Antique Import Corp. v. Royal Saxe Corp., 311 F. Supp. 1261, 1266 (S.D.N.Y. 1969).

16/ Complaint, ¶16.

Procedure. 17/ Schneider v. Union Oil Co. of California, 86 Cal. Rptr. 315, 317, 6 Cal. App. 3d 987 (Ct. App. 1970). 171a

While it is true that the basic standard for determining which of the various local periods of limitations is the appropriate one to apply is that it should be the "one which best effectuates the federal policy at issue," Charney v. Thomas, 372 F. 2d 97, 100 (6th Cir. 1967); Vanderboom v. Sexton, 422 F. 2d 1233, 1237 (8th Cir. 1970), such a choice is unnecessary in the instant case, since regardless of the characterization of plaintiff's causes of action, each is barred by the California statute of limitations.

17/ §343 provides as follows:

> "ACTIONS FOR RELIEF NOT HEREINBEFORE PROVIDED FOR. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

III. The Continuing Injury Claim

The damages plaintiff seeks in this action are in two parts. Plaintiff first seeks to recover the allegedly illegal profits earned by defendants as a result of the 1968 sale of Fund's investment advisor. In addition, plaintiff seeks, on behalf of Fund, the return of all consideration in the form of investment advisory and underwriting fees paid by Fund to FAIMCO (and its successor AEIMCO) since the merger, and which Fund continues to pay. It is plaintiff's contention that even if a cause of action to recover profits from the 1968 sale of FAIMCO, and damages for the allegedly defective 1968 proxy statement is barred by the California statute of limitations, the continuing payments under the Fund-FAIMCO agreements are nonetheless actionable. It is clear, however, that these payments do not constitute independent wrongs but rather flow from the reinstitution of the Fund-FAIMCO agreement in 1968 as part of the AMEXCO-FAC merger deal. No independent event subsequent to the sale of FAIMCO in 1968 has been complained of in this action. 18/

18/ The investment advisory agreement between Fund and FAIMCO (AEIMCO) was re-approved annually by the Board of
(footnote continued)

In effect, plaintiff is attempting to convert what would otherwise be an element of damages flowing from an alleged wrong no longer actionable because of the statute of limitations bar, into a series of independent and continuing injuries.

In Lowell Wiper Supply Co. v. The Helen Shop, Inc., 235 F. Supp. 640, 644 (S.D.N.Y. 1964), plaintiffs brought a derivative action on behalf of The Helen Shop alleging that the chief executive officer of the corporation had improperly availed himself of a corporate opportunity by entering into certain leases of property in 1954, and then subletting such property to the corporation at excessive rentals, in breach of his fiduciary duty. Plaintiffs' action was commenced in 1963 and was challenged as untimely in the face of a six-year statute of limitations.

(Footnote continued from previous page)

Directors and shareholders of Fund. Defendants' Reply Memorandum, at 9. While a cause of action may exist based on these subsequent approvals--an issue which we need not reach--plaintiff's complaint does not seek to attack the validity of these agreements on the basis of events occurring subsequent to the completion of the merger.

Plaintiffs nonetheless contended that the alleged excessive rental payments under the subleases were continuing and independent wrongs, such that recovery could be had for those transactions which had occurred within the limitations period.

The court refused to adopt plaintiff's argument stating:

> "The courts of New York have consistently rejected the theory advanced by plaintiffs that each payment pursuant to a wrongful agreement gives rise to a separate and distinct claim, whether the theory was invoked to establish capacity of a shareholder to sue or to overcome the bar of a statute of limitations. The continued payments merely reflect the damages sustained by the party wronged." [19] 235 F. Supp. at 644 (footnotes omitted).

19/

Similarly, limitations on civil and criminal conspiracy run from the last overt act, although damages continue to flow from the condition created by the conspiracy. See, e.g., Rutkin v. Reinfeld, 229 F. 2d 248 (2d Cir.), cert. denied, 352 U.S. 844 (1956); Saunders v. National Basketball Ass'n, 348 F. Supp. 649, 652-53 (N.D. Ill. 1972); Lowell Wiper Supply Co. v. The Helen Shop, Inc., 235 F. Supp. 640, 644 (S.D. N.Y. 1964); Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F. Supp. 401, 405-06 (S.D.N.Y. 1961). See generally, Developments in the Law--Statute of Limitations, 63 Harv.L. Rev. 1177, 1206 (1950).

The rationale of the Lowell case is fully applicable here. Consequently, we are constrained to grant defendants' motion in its entirety.

SO ORDERED.

Dated: New York, New York
October 31, 1975

Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

Notice of Appeal

1760

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONROE KORN,

Plaintiff,

v.

FRED H. MERRILL, et al.,

Defendants.

74 Civ. No. 1862(RLC)

NOTICE OF APPEAL

UNITED STATES COURT OF APPEALS
FILED
DEC 1 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

NOTICE IS HEREBY GIVEN, that MONROE KORN, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the opinion and Order in this action, dated October 31, 1975, and filed in this court on November 5, 1975.

Dated: New York, N.Y.
November 25, 1975

KAPLAN, KILSHEIMER & FOLEY

By _____

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CLARENCE GRANZA being duly sworn, deposes and says:

1. Deponent is not a party to the action, is over the age of 18 and resides at 60 South 3rd Street, Brooklyn, N.Y.

2. That on April 2, 1976, he served two copies of the Joint Appendix upon the offices of the following attorneys in the within action by delivering a copy thereof personally, to the person in charge of said office:

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Clarence Granza

Sworn to before me this
2nd day of April, 1976.

Monroe D. Rosen
Notary Public

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4616690
Qualified in Kings County
Commission Expires March 30, 1977

Service of ~~three~~ Two (2) copies of the within
is admitted this 2 day of April 1976

(2) COPY RECEIVED
4-2- 1976
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
By Clara A. Lovero